TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]41.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

ROBERT W. SHEEGOG, ADMINISTRATOR OF THE ESTATE OF JOHN E. SHEEGOG, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED DECEMBER 21, 1907.

(20,944.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1908.

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1 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Please before the Honorable The Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the 20th Day of June, A. D. 1907.

ILLINOIS CENTRAL RAILROAD CO., Appellant,
vs.
JOHN E. SHEEGOG'S ADMINISTRATOR, Appellee.

Appeal from Union Circuit Court.

Be it remembered that on the 24th day of August, 1905, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals, a transcript of the record herein, and which is in words and figures as follows to-wit:

2 STATE OF KENTUCKY, *County of Union:*

Pleas before the Honorable J. W. Henson, Judge of the Union Circuit Court, in the Fifth Judicial District, in the State of Kentucky, at the Court House, in the City of Morganfield, County of Union, and State of Kentucky, and on the dates here-in-after mentioned.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Deceased, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD CO., and F. J. DURBIN, Defendants.

Transcript of Record.

Be it remembered, That, here-to-fore, to-wit, on the 22nd day of October, 1903, came the Plaintiff, R. W. Sheegog, Adm'r of John E. Sheegog deceased, by counsel, and filed his petition with one exhibit herein.

The said petition is as follows, to-wit:—

3 Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Deceased, Plaintiffs,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, and F. J. DURBIN, Defendants.

Petition.

The Plaintiff says that the Illinois Central Railroad Company is a corporation organized under and by virtue of the laws of the State of Illinois, and as such is engaged in operating and conducting a

general railroad business in the State of Kentucky, and was at all times here-in-after mentioned and referred to, engaged in operating and conducting a railroad and general railroad business, through the County of Union and State of Kentucky, and likewise through many other Counties of said State, that as such corporation it has power to sue and be sued, contract and be contracted with, and to do any and all things which a natural person might do if engaged in similar business.

The Plaintiff further states that the Chicago, St. Louis & New Orleans Railroad Company is a domestic corporation, and was organized and created under and by virtue of the laws of the State of Kentucky, and is and was at all times hereinafter mentioned a Kentucky corporation with power to sue and be sued, contract and be contracted with, and as such a corporation the said Chicago, St. Louis & New Orleans Railroad Company became the owner and controller of the line of Railroad through Union County Kentucky, upon which the injuries hereinafter complained of occurred, that after

4 the said Defendant, the Chicago, St. Louis & New Orleans Railroad Company, became the owner of said line of Railroad, it leased same to its Co-defendant, the Illinois Central Railroad Company, by a written lease duly executed, signed, acknowledged, delivered and accepted by the said Illinois Central Railroad Company, which written lease was duly recorded in the proper offices in the State of Kentucky, and immediately went into effect between the corporate Defendants, and there-after the Illinois Central Railroad Company undertook to, and has operated said railroad in and through said County.

The Plaintiff further states that through the gross negligence and carelessness of the Defendant, F. J. Durbin, and the aforesaid corporate defendants, his intestate, J. E. Sheegog, was on the 7th day of May 1903, injured to such an extent that he did then and there immediately die; that at the time of the death of said John E. Sheegog, he was a resident and domiciled in Muhlenberg County, and after his said death this Plaintiff who was the Father of the said decedent, applied to the County Court of said County, and was duly and legally appointed and qualified as the Administrator of the estate of said decedent, and he immediately accepted said appointment and trust, and executed bond before said County Court of Muhlenberg County, for the faithful performance of his duty which bond was duly approved and accepted by the County Court aforesaid, and this Plaintiff immediately accepted said trust, and entered upon the discharge of his duties as such administrator, and is now the lawful administrator of said estate and is acting as such, by reason and virtue of the aforesaid appointment and qualification which appear by the orders of said Court, so appointing him filed as a part of this petition, and marked for identification, Exhibit No. 1.

5 The Plaintiff further states that on the 7th day of May, 1903, his intestate was in the employment of the Defendant, the Illinois Central Railroad Company, as its engineer, on one of its trains, and while in the performance of his duty as such engineer, the train upon which he was so engaged, was through the joint

and gross negligence and carelessness of the three defendants herein, derailed, and his intestate thereby instantly killed.

At that time the Defendant, the Chicago, St. Louis & New Orleans Railroad Company was the owner of said road bed, fences, right-of-way trestles and bridges where said accident happened, and the Illinois Central Railroad Company was the lessee of said railroad property, and premises, and was the owner of the engine and cars, train and appliances by which the said intestate was killed, and was operating said road trains and engine, and the Defendant F. J. Durbin, who is a citizen of Kentucky was the conductor in the employment of the latter Railroad Company, and in charge of said train and engine and appliances, and the said intestate was required to obey and was obeying and acting under the orders of the said defendant, F. J. Durbin.

The Plaintiff now says, that by the negligence of both of said Railroad Company-s defendants hereto, the said road bed, rails, track, cattle-guards, ties, fence and right-of-way, of the said railroad was allowed to be and for a long time had been in a weak, rotten, ruinous and defective, and improper condition, and by the negligence of the Illinois Central Railroad Company, its engine and cars were knowingly allowed to be and remain in an improper, defective and dangerous condition, and its said engine and cars to be
6 so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road premises and cars of the Defendants were known to the said Defendants, and at the time of this said wreck and accident same were being operated in a careless manner by all of said Defendants; and the said Durbin, by his negligence in running, ordering and directing said train contributed to cause of said accident; and the Plaintiff says that the negligence of the Defendant in its maintenance of its tracks, road bed, engine, cattle guard, rails, ties, fences, etc., as above set out, and together with the negligence of the said Illinois Central Railroad Company, in directing and permitting its engine, cars and road to be operated while in a defective and dangerous condition, and the negligence of the said Conductor, in ordering and directing the running and management of said train, and in failing to give proper directions all together jointly caused said wreck and killed the Plaintiff's said intestate, who was a young vigorous man, and excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects and making and saving large quantities of money; and by the negligence of the said defendant in thus causing the death of said intestate, John E. Sheegog, the Plaintiff has been damaged in the sum of twenty five thousand dollars, ($25,000.00).

Wherefore, Plaintiff prays judgment against the Defendants for twenty five thousand dollars ($25,000.00), for costs herein expended, and for all proper relief.

HENDRICK & MILLER,
Atty's for Pl'ff.

7 Thereupon on the 22nd day of October, 1903, the Clerk of the said Court issued summons and one copy to Union County, which summons is as follows, to-wit:

The Commonwealth of Kentucky to the Sheriff of Union County, Greeting:

You are commanded to summon Illinois Central Railroad Company to answer, in ten days after the service of this summons, a petition filed against it in the Union Circuit Court by R. W. Sheegog, Adm'r of John E. Sheegog, deceased, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within ten days after the service thereof to the Clerk's office of this Court.

Given under my hand as Clerk of said Court, this 22nd day of October, 1903.

J. E. LILLY,
Clerk of Union Circuit Court.

The return of the Sheriff on said summons is as follows, to-wit:—
Executed on Illinois — Railroad Company, by delivering a copy of the within summons to J. Mack. Tichner, Agent at Morganfield, Kentucky, this 22nd day of October, 1903.

WM. M. BERRY, *S. U. C.*,
By REESE BERRY, *D. S.*

8 On the 22nd day of October, 1903, the Clerk of the said Court issued summons and one copy to Henderson County, which summons is as follows, to-wit:—

The Commonwealth of Kentucky, to the Sheriff of Henderson County, Greeting:

You are commanded to summon Chicago, St. Louis & New Orleans Railroad Company to answer in twenty days after the service of this summons, a petition filed against it in the Union Circuit Court by R. W. Sheegog, Adm'r of John E. Sheegog deceased, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within twenty days after the service thereof to the Clerk's office of said Court.

Given under my hand as Clerk of said Court, this 22nd of October, 1903.

J. E. LILLY,
Clerk of Union Circuit Court.
By JNO. H. WALL,
Deputy Clerk.

The return of the Sheriff on said summons is as follows, to-wit:—
Executed on Chicago, St. Louis & New Orleans Railroad Company by delivering a copy of this summons to E. F. Coons, Agent and

Chief Officer, of said Railroad Company in Henderson County, this November 4th, 1903.

HENRY DIXON, *S. H. C.*,
By ED MELTON, *D. S.*

9 Executed on the within named F. J. Durbin, by delivering him a copy, December 30th, 1903.

HENRY DIXON, *S. H. C.*,
By R. M. DIXON, *D. S.*

On the 22nd day of October, 1903, the Clerk of the said Court issued summons and one copy to Jefferson County, which summons is as follows, to-wit:—

The Commonwealth of Kentucky to the sheriff of Jefferson County, Greeting:

You are commanded to summon Chicago, St. Louis & New Orleans Railroad Company to answer in twenty days after the service of this summons, a petition filed against it in the Union Circuit Court by R. W. Sheegog Adm'r of John E. Sheegog, deceased, and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within twenty days after the service thereof to the Clerk's office of said Court.

Given under my hand as Clerk of said Court, this 22nd day of October, 1903.

J. E. LILLY,
Clerk Union Circuit Court,
By JNO. H. WALL,
Deputy Clerk.

The return of the Sheriff on said summons is as follows, to-wit:—
Executed November 5th, 1903, on Chicago, St. Louis & New Orleans Railroad Company by delivering a copy of the within summons to C. C. Cameron, General Freight Agent, of said Company, he being chief Officer found in this county at this time.

E. T. SCHMITT, *S. J. C.*,
By E. H. WOODS, *D. S.*

10 At the November term of said Court, on the 2nd day of November, 1903, the Defendant, The Illinois Central Railroad, by its counsel, filed in Open Court a petition to remove the case to the United States Circuit Court for the Western District of Kentucky which petition is in words and figures as follows:—
To-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Deceased, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, and F. J. DURBIN, Defendants.

Petition to Remove This Case to the United States Circuit Court for the Western District of Kentucky.

Your petitioner, Illinois Central Railroad Company, states that it is one of the Defendants in the above entitled action, that the matter is dispute therein exclusive of interest and costs exceeds the sum or value of $2000.00. That such action is of a civil nature, wherein the Plaintiff, R. W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, claims the right to recover damages in the sum of $25,000.00, for the said John E. Sheegog, deceased, by reason of the derailment of one of your petitioner's trains upon which the said John E. Sheegog, deceased, was acting as Engineer, through the negligence of your petitioners and its co-defendants,
Chicago, St. Louis & New Orleans Railroad Company and
11 F. J. Durbin, all of which claims of damage or negligence, your petitioner will controvert.

Your petitioner states that in the above mentioned action there is a controversy which is wholly between citizens of different States, and which can be fully determined between them without the presence in said action of your petitioners' co-defendants, Chicago, St. Louis & New Orleans Railroad Company, and F. J. Durbin, as parties thereto, or either of them which said controversy is between your petitioner who avers that it was, at the time of the commencement of this action and still is, a Corporation created by and organized under and pursuant to the laws of the State of Illinois, and not under or pursuant to the laws of the State of Kentucky, having its principal place of business in the City of Chicago, and in said state of Illinois, and a citizen of the State of Illinois, and not a citizen of the State of Kentucky, and the Plaintiff, R. W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, who was at the time of the commencement of this action and is now a citizen and resident of the State of Kentucky, and both said Plaintiff and your petitioner are actually interested in said controversy which is substantially as follows:—

Whether or not your petitioner as Employer of its co-defendant F. J. Durbin, is responsible in damages to the Plaintiff as Administrator for the death of said John E. Sheegog, resulting from the derailment of one of your petitioner's trains on the 7th day of May, 1903.

Your petitioner further states that it controverts the claim of any negligence of either of its co-defendants, Chicago, St. Louis & New
Orleans Railroad Company or F. J. Durbin, or your peti-
12 tioner. Your petitioner controverts that any negligence contributing to or causing the said accident or death of Plain-

tiff's decedent was a joint or concurrent negligence of your petitioner, the Chicago, St. Louis & New Orleans Railroad Company, or F. J. Durbin, and your petitioner charges that the Plaintiff joined the said Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin as co-defendants with your petitioner in this action for the purpose and solely for the purpose of preventing a removal of this action to the United States Circuit Court for the Western District of Kentucky, Petitioner, Illinois Central Railroad Company admits that its co-defendant, Chicago, St. Louis & New Orleans Railroad Company is empowered to construct and to lease to your petitioner its Railroad mentioned in Plaintiff's petition, and says that it was so empowered by act of the General Assembly of the Commonwealth of Kentucky long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which said act of the General Assembly became a law on the 24th day of February, 1882, and is entitled

and that pursuant to such powers the Chicago, St. Louis & New Orleans Railroad Company being the owner leased to your petitioner all of the Railroad mentioned in the petition, and parted with all dominion over it, and that your petitioner has since said lease continuously operated said Railroad exclusively, and that said lessor has never at any time operated it, which is, and at the commencement of this action, and at all times was well known to plaintiff.

13 Your petitioner says that Plaintiff's decedent at the time he received the fatal injury complained of was an employee of your petitioner, and not an employee of either of your petitioner's co-defendants, and was not and never had been an employee or in the employ of said lessor, or said F. J. Durbin, and that all the said facts were well known to Plaintiff when this action was brought. Your petitioner says that to avoid such removal to Federal Court of this action, Plaintiff joined your Petitioner's co-defendants, one a Kentucky Corporation, and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was through joint and gross negligence and carelessness of all the defendants derailed and said decedent instantly killed, and falsely and fraudulently alleged that by the negligence of both of Defendants' road-bed, rails, track, cattle guards, fences, and right-of-way of the said railroad was allowed to be and for a long time had been, in a weak, rotten, ruinous, defective and improper condition, and by the negligence of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road premises and cars of the Defendants was known to the Defendants, and that at the time

of the wreck and accident the same were being operated in a careless manner by all of the Defendants, and the Defendant, Durbin, by his negligence in running, ordering and directing said train contributed to cause said accident, and that the negligence of the Defendant in its maintenance of its track, road-bed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with
14 the negligence of your Petitioner in directing and permitting its engine, cars and road-bed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions altogether caused said wreck, and killed said decedent, when the Plaintiff well knew that such allegations were untrue, and Plaintiff did not expect to establish allegations, and did not make them for the purpose of proving them at the trial or of substantiating his cause of action therewith, but made them solely for the purpose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal Court. Your petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States for the Western District of Kentucky, on the first day of its next session, a copy of the record in this case, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this action was wrongfully or improperly removed thereto.

And it prays this Court to proceed no further herein except to accept this petition and approve said surety and bond.

H. D. ALLEN,
PIRTLE & TRIBUE,
For Petitioner.

And on the back of said petition is the following certificate, in words and figures, to-wit:—

STATE OF KENTUCKY, *County of Union, set:*

J. McH. Tichenor says he is the Chief officer and the
15 agent of the Illinois Central Railroad Company, residing in Union County Kentucky and that he believes the statements contained in the foregoing petition are true.

J. McH. TICHENOR.

Subscribed and sworn to before me by J. McH. Tichenor, this November 2nd, 1903.

G. B. ALLEN,
Examiner for Union County, Kentucky.

Thereupon the Defendant made, executed and filed a bond for the transfer of this Cause to the United States Circuit Court for the Western District of Kentucky, which bond is in words and figures as follows, to-wit:—

In the Union Circuit Court, Union County, State of Kentucky.

R. W. SHEEGOG, Administrator of John E. Sheegog, Deceased, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, and F. J. DURBIN, Defendants.

Bond for the Transfer of this Cause to the United States Court for the Western District of Kentucky.

Know all men by these presents that we, The Illinois Central Railroad Company as principal and H. D. Allen as surety, are held and firmly bound unto R. W. Sheegog, Administrator of John E. Sheegog, deceased, and unto all other persons whom it may concern in the penal sum of two hundred and fifty dollars for
16 the payment of which well and truly to be made, we bind ourselves, our heirs and representatives and assigns, jointly and severally firmly by these presents:—

Yet upon these conditions: The said Illinois Central Railroad Company having petitioned the Union Circuit Court of Union County, State of Kentucky, for the removal of a certain cause therein pending wherein R. W. Sheegog, Administrator of John E. Sheegog, is plaintiff, and the Illinois Central Railroad Company, Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin are defendants, to the Circuit Court of the United States in and for the Western District of Kentucky.

Now if said Illinois Central Railroad Company, your petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 2nd day of November, A. D. 1903.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Attorney.*
H. D. ALLEN, *Surety.*

At the November Term of said Court, beginning November 2nd, 1903, and on the first day of said Term, November 2nd, 1903, *and on the first day of said Term, November 2nd, 1903,* the following order was entered for record, to-wit—

17 Union Circuit Court.

R. W. SHEEGOG, Administrator of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Order.

This day came the Defendant, Illinois Central Railroad Company, and tendered and offered to file its petition and bond, the surety in which was adjudged by the Court as solvent and good for the amount thereof, and moved the Court to remove this cause to the United States Circuit Court for the Western District of Kentucky, and the Plaintiff objected to the filing of said petition and bond and the Court being advised over-ruled said objection and ordered said petition and bond to be filed which was done, to which the Plaintiff excepted, and the Court being advised declined to accept said bond and over-ruled the motion to approve same and over-ruled the petition and motion for the removal of this cause to said United States Circuit Court but adjudges this cause not so removable and adjudges that this Court has jurisdiction of this cause and retains same, to which ruling of the Court the said Defendant Illinois Central Railroad Company, objects and excepts and prays an appeal to the Court of Appeals which is granted.

At the November Term of said Court, beginning November 2nd, 1903, and on the eighth day of said term, November 9th, 1903, the Defendant, the Illinois Central Railroad Company by its
18 counsel, filed the following answer, which is in words and figures to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Administrator of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Answer of I. C. R. R. Co.

The defendant, the Illinois Central Railroad Company objects to this Court proceeding further in this cause on the ground that since filing its petition and bond for removal to the Circuit Court of the United States for the Western District of Kentucky the jurisdiction of this Court herein has ceased, and under protest it makes and files its separate answer to the Plaintiff's petition herein. It denies that through the gross negligence of itself or of its co-defendants, Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin, J. E. Sheegog was on the 7th day of May, 1903, or at any other time injured to such an extent that he did then and there immediately die; denies that on said date and while in the employ-

ment of this Defendant as Engineer on one of its trains, the said train on which he was so engaged was through the negligence of this Defendant or either of its co-defendants, or through the joint and gross negligence and carelessness of all three — the Defendants herein derailed or Plaintiff's intestate, thereby instantly killed; denies that Plaintiff's intestate at the time of his death was required to obey or was obeying or acting under the orders of the Defendant F. J. Durbin; denies that by the negligence of itself or of its co-defendant Railroad Company or that by the negligence of either of them the said road-bed, rails, tracks, cattle guards, ties,
19 fences, or right-of-way of the Defendant or its co-defendant Railroad Company were allowed to be and for a long time had been in a weak, rotten, ruinous, defective, or improper condition, and denies that by the negligence of this Defendant, its engine and cars were knowingly allowed to be or remain in an improper defective or dangerous condition, or its said engine or cars to be so constructed as to be in a dangerous condition, denies that such improper and dangerous condition of the said road, premises or cars of the Defendant's if it existed, was known to this Defendant, or either of its co-defendants, and denies that at the time of the wreck and accident complained of, by Plaintiff, the same were being operated in a careless manner by all or any of the Defendants hereto; denies that the Defendant Durbin was negligent in running, ordering and directing said train; and denies that by such negligence he contributed to cause the said accident, and denies that the said wreck and the killing of Plaintiff's intestate were caused by the negligence of this Defendant in its maintenance of its track, road-bed, engine, cattle guards, rails, ties, fences, &c., or that such alleged negligence together with the negligence of this Defendant in directing or permitting its engine, cars or road to be operated while in a defective or dangerous condition or the negligence of said conductor in ordering and directing the management of said train or in failing to give proper directions, but says there was no such negligence on the part of this defendant and its co-defendants or any of them. This defendant has no knowledge sufficient to form a belief as to whether Plaintiff's intestate was making and saving large quantities of money and it denies that in the death of his intestate, Plaintiff has been damaged in the
20 sum of $25,000.00 or any sum. This defendant says the derailment and wrecking of said train by reason of which Plaintiff's intestate was killed was caused solely by collision resulted from the negligence of Plaintiff's intestate in failing to discover the said mule in time to avoid striking it or in negligently and carelessly failing to avoid collision with it after it was discovered by him and but for which negligence upon the part of Plaintiff's intestate the said collision and the wrecking of the train resulting in his death would not have occurred, or if not caused by the negligence and carelessness of Plaintiff's intestate the said collision was unavoidable, one or the other of which contentions is true, but defendant does not know which is true. The accident which resulted in the death of Plaintiff's intestate knew when he

accepted employment with defendant that there was danger of such accidents under the most careful management of trains and contracted with Defendant to assume the risks of such accidents and not to claim any damage from Defendant that might result to him from such accidents while engaged in the service of Defendant.

Wherefore defendant prays to be hence dismissed with its costs and for all proper relief.

H. D. ALLEN,
Attorney for Defendant.

And on the 13th day of November, 1903, at the November Term of said court, on the 11th day of Court, the Plaintiff, by its counsel, filed the following reply to the answer of the Defendant, in open Court, which reply is in figures and words, to-wit:—

21 Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Reply.

Plaintiff for reply to defendants' answer herein, says it is true that the train upon which his intestate was working and by the wrecking of which, he was killed, did strike a mule, and was thus thrown from the track, but he says that this was not without fault or carelessness upon the part of the Defendants; he says that it was by the negligence of the Defendants in failing to maintain their fence on the side of the track, and their cattle-guard at the termination of these fences at a public road, that the said mule got upon the track. He says that there are fences along the line of the right of way up to a public road, which crosses the track near the place where the mule was struck, and that at said Public road, and at the termination of the said fences the defendants negligently failed to maintain a cattle-guard, and that the said animal went upon the track at that place, went down upon the track between said fences to the point where collision occurred; and he denies that the collision resulted from the negligence of Plaintiff's intestate in failing to discover the said mule in time to avoid striking it, or in negligently or carelessly failing to avoid collision with it after it was discovered by him; and denies that said negligence existed, or that it caused the said wreck, but says that because of the negligence of the Illinois Central Railroad Company, defendant herein, in the construction of its engine and Defendant's negligence in failing to keep said track in proper condition, the said
22 collision with the mule wrecked the train, and that all these things together with the negligence of all three of the Defendants, as alleged in the petition of Plaintiff herein caused the said wreck, and the death of Plaintiff's intestate, and but for the negligence of the Defendants as alleged in the Petition herein,

all acting together, the said wreck would not have occurred; and Plaintiff denies that his intestate contracted with defendant, or any of the defendants to assume the risk of such accidents, and not to claim any damages from defendant that might result to him from such accidents while engaged in the service of the Defendant.

Wherefore, he prays as in his petition.

HENDRICK & MILLER,
Att'ys for Pl'ff.

At the November Term of said Court, beginning November 2nd, 1903, and on the 23 day of said Term, November 24th, 1903, the following order was entered for record:—to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
I. C. R. R. Co., &c., Defendants.

Order.

This day came the Defendant, Illinois Central Railroad Company and by leave of the Court filed its amended answer herein, also came said Defendant and filed its motion to strike from Plaintiff's reply, and without waiving the said motion also filed its rejoinder to said reply. Said motion to strike from Plaintiff's reply is left open until the next term of this court, the Plaintiff is given thirty days from this date to reply to Defendant's amended
23 answer and to surrejoin to its rejoinder, and this cause is continued.

And which amended answer filed by Defendant is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Administrator of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Amended Answer of I. C. R. R. Co.

The Defendant Illinois Central Railroad Company objects to this Court proceeding further in this cause on the ground that since filing its petition and bond for removal to the Circuit Court of the United States for the Western District of Kentucky the Jurisdiction of this Court herein has ceased and under protest it makes and files its separate answer to the Plaintiff's petition herein. It denies that through the gross or any negligence of itself or of Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin, Co-Defendants, or any of them J. E. Sheegog was on the

7th day of May, 1903, or at any other time injured to such an extent that he did then and there die; denies that on said date or at any other time or while in the employment of this Defendant, as Engineer on one of its trains, the said train on which he was so engaged was through the negligence or carelessness of all three the defendants herein, derailed or Plaintiff's intestate thereby killed; denies
24 that Plaintiff's intestate, at the time of his death was required to obey or was obeying or acting under the orders of the defendant, F. J. Durbin; denies that by the negligence of either of them the said road or its co-defendant Railroad Company, or that by the negligence of either of them the said road bed, rails, tracks, cattle guards, ties, fences, or right-of-way of the Defendant or its co-defendant Railroad Company, were allowed to be and for a long time or at all had been or were in a weak, rotten, ruinous, defective or improper condition, and denies that by the negligence of this defendant its engine or cars were knowingly allowed to be, or remain in an improper or defective or dangerous condition, or its said engine or cars to be so constructed as to be in a dangerous condition, denies that such improper or dangerous condition of the said road, premises or cars of the defendants, if it existed, was known to this defendant or either of its co-defendants, and denies that at the time of the wreck and accident complained of by Plaintiff, the same were being operated in a careless manner by all or any of the Defendants hereto; denies that the said Defendant Durbin was negligent in running or ordering or directing said train and denies that by his negligent running or ordering or directing said train he contributed to cause the said accident and denies that the said wreck and the killing of Plaintiff's intestate were caused by the negligence of this defendant in its maintenance of its track, or road bed, or engine or cattle guards, or rails, or ties, or fences, &c., or that such alleged negligence or the negligence of this Defendant in directing or permitting its engine, or cars, or road to be operated while in a defective or dangerous condition, or the negli-
25 gence of said conductor in ordering or directing the management of said train, or in failing to give proper directions altogether or at all caused the said wreck and killing of Plaintiff's intestate, but says there was no such negligence on the part of this Defendant or its co-defendant, or any of them. This defendant has no knowledge sufficient to form a belief as to whether Plaintiff's intestate was making and saving large quantities of money and it denies that in the death of his intestate Plaintiff has been damaged in the sum of $25,000.00 or any sum. This Defendant says the derailment and wrecking of said train by reason of which Plaintiff's intestate was killed was caused solely by collision of the train with a mule which, without fault or carelessness upon the part of this Defendant, strayed upon its road bed and track and which collision resulted from the negligence of Plaintiff's intestate in failing to discover the mule in time to avoid striking it, or in negligently or carelessly failing to avoid collision with it after it was discovered by him, and but for which negligence upon the part of Plaintiff's intestate the said collision and the wrecking of the train

resulting in his death would not have occurred, or, if not caused by the negligence or carelessness of Plaintiff's intestate, the said collision was unavoidable, one or the other of which contentions is true, but defendant does not know which is true. The accident which resulted in the death of Plaintiff's intestate was such as is incident to the operation of a railroad and Plaintiff's intestate knew when he accepted employment with defendant that there was danger of such accidents under the most careful management of trains and contracted with defendant to assume the risks of such accidents and not to claim any damage from defendant that might result to him from such accidents while engaged in the service of De-
26 fendant.

Wherefore defendant prays to be hence dismissed with its costs and for all proper relief.

I. C. R. R. CO.,
By H. D. ALLEN, *Attorney.*

And which Motion filed by Defendant is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD CO., &c., Defendants.

Motion.

The Defendant Illinois Central Railroad Company moves the Court to strike from the Plaintiff's reply filed herein the following words, "But says that because of the negligence of the Illinois Central Railroad Company, defendant herein, in the construction of its engine and Defendant's negligence in failing to keep said track in proper condition, the said collision with the mule wrecked the train and that all these things together with the negligence of all three of *its* defendants, as alleged in the Petition of Plaintiff herein, caused the said wreck, and the death of Plaintiff's intestate, and but for the negligence of Defendants as alleged in the Petition herein, all acting together, the said wreck would not have occurred."

H. D. ALLEN,
Att'y for I. C. R. R. Co.

27 And the Rejoinder filed by Defendant is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
I. C. R. R. Co., &c., Defendants.

Rejoinder.

Without waiving the motion filed herein to strike from the Plaintiff's reply the Defendant Illinois Central Railroad Company for rejoinder denies that the mule with which this Defendant's train came in contact on the occasion of the killing of Plaintiff's intestate, got upon the track by reason of the negligence of the defendants or any of them in failing to maintain a fence or fences on the side or sides of the track, or to maintain a cattle-guard at the termination of such fence or fences or elsewhere; denies that the Defendants or any of them negligently failed to maintain a fence or fences on the side or sides of the track, or a cattle-guard at the termination of said fences at a public road or elsewhere, denies that the mule went up the track at such place, or that it went down upon the track between said fences to where the collision occurred, but says that if said mule did go upon or down the track it was not by reason of any negligence upon the part of Defendants or any of them in failing to maintain fences or cattle guard; denies that the engine of this Defendant was negligently constructed, or that this Defendant negligently failed to keep the track in proper condition, or that by reason of any such negligence the collision with the mule occurred, or the death of Plaintiff's intestate caused,
28 and denies that there was any such negligence upon the part of these defendants or any of them.

Wherefore Defendant prays as in its answer and amended answer.

I. C. R. R. CO.,
By H. D. ALLEN, *Attorney.*

At the November Term of said Court, beginning November 6th, 1904, and on the third day of said Term, November 9th, 1904, the Defendant, Chicago, St. Louis & New Orleans Railroad, filed the following Motion in Open Court, which is in words & figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Motion.

Now comes the Defendant, Chicago, St. Louis and New Orleans Railroad Company and enters its appearance to this cause only for

the purpose of moving to quash, and it does now move to quash the return of the Officer Henry Dixon, Sheriff of Henderson County, endorsed upon the summons against it herein, which return is in words and figures as follows:—"Executed on the within named Railroad Co. by delivering a copy of this summons to E. T. Coons agent and chief Officer of said Railroad Company in Henderson County, this Nov. 4th, 1903." because the said E. T. Coons
29 is not now and was not on the 4th day of November 1903, or at any other time the chief officer or agent of Defendant Chicago, St. Louis & New Orleans Railroad Co., or its President, or vice-president, secretary or librarian, cashier or treasurer, or its managing agent, or its agent upon whom process could be or can be served under statement filed with the Secretary of State as required by section 571 of Ky. Statutes.

H. D. ALLEN,
Att'y for C., St. L. & N. O. R. R.

At the November Term of said Court, Beginning November 6th, 1904, and on the Third day of said Term, November 9th, 1904, the Defendant, Chicago, St. Louis & New Orleans Railroad Company, filed the following Affidavit of E. F. Coon, in Open Court, which affidavit is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Affidavit.

The Affi*davit*, E. F. Coon says he is the same E. F. Coon upon whom summons was served in the above styled cause on the 4th day of Nov. 1903, by Henry Dixon, Sheriff of Henderson County, by Ed Melton, his Deputy Sheriff. He further says that at the time of the service of said summons upon him he was a resident of said County and that he was not then Chief Officer or Agent of the Defendant Chicago, St. Louis, & N. O. Railroad Company, or
30 any Officer or agent of the said Company, and that he is not now nor has he ever been the chief officer or agent or any Officer or agent whatever of said Company, and that he was neither President or vice-president, Secretary or Librarian, cashier or treasurer, or managing Agent of said Railroad Company at the time of the service of said summons upon him, nor has he ever held such relation toward said Railroad Company.

He further says that no statement of said Railroad Company has been filed in the Office of the Secretary of State of Kentucky naming affiant as its agent upon whom process could be or can be served, and that he has never been agent of said Company for said purpose or any other purpose.

E. F. COON.

STATE OF KENTUCKY, *County of Christian, set:*

Subscribed and sworn to before me by E. F. Coon, this the 15th day of October, 1904. My Commission expires 20th day of February, 1906.

[SEAL.] BAILEY RUSSELL,
Notary Public.

On the 19th day of December, 1904, the Defendant, F. J. Durbin, by his Counsel, filed the following Demurrer, which is in words and figures following, to-wit:—

31 Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD CO., &c., Defendants.

Demurrer.

The defendant F. J. Durbin, demurs to the petition herein because it does not state facts sufficient to constitute a cause of action against him.

F. J. DURBIN,
By H. D. ALLEN, *Att'y.*

On December 19th, 1904, the Defendant F. J. Durbin, by his counsel filed the following Answer, which answer is in words and figures to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendants.

Answer of F. J. Durbin.

The Defendant F. J. Durbin without waiving his motion or demurrer filed herein but still insisting upon same, for his separate answer herein denies that through the gross or any negligence whatever of himself or of the Illinois Central Railroad Company, or of Chicago, St. Louis & New Orleans Railway Co. co-defend-
32 ants, or any of them, J. E. Sheegog, was on the 7th day of May, 1903, or at any other time, injured to such an extent that he did then and there die; denies that on said date or any other time or while in the employment of Illinois Central Railroad Co. as engineer on one of its trains, the said train on which he was so engaged was through the negligence of this defendant or either of his co-defendants, or through the joint gross negligence of all three defendants herein derailed or Plaintiff's intestate thereby killed;

denies that Plaintiff's intestate at the time of his death was required to obey or was obeying, or was acting under the orders of this Defendant; denies that by the negligence of his co-defendants Illinois Central Railroad Co. and Chicago, St. Louis & New Orleans Railway Co. or that by the negligence of either of them the said road-bed, rails, tracks, cattle-guards, ties, fences, or right-of-way of Defendant, Illinois Central Railroad Company, the engines or cars of the Illinois Central Railroad Company, were knowingly, or at all, allowed to be or remain in an improper or defective or dangerous condition, or said engine or cars to be so constructed as to be in a dangerous condition, denies that any such improper or dangerous condition of the said road, premises or cars, if it existed, was known by this defendant or to either of his co-defendants and denies that at the time of the wreck and accident complained of by Plaintiff the same were being operated in a careless manner by all or by any of the Defendants hereto; denies that this Defendant was negligent in running or ordering, or directing said train and denies that by any negligent running or ordering or directing of said train he contributed to cause the said accident, and denies that the said wreck or the killing of Plaintiff's intestate were
33 caused by the negligence of Illinois Central Railroad Company or its co-defendant, Chicago, St. Louis & New Orleans Railway Company in the maintenance of its track, road-bed, engine, cattle-guards, rails, ties or fences, or in any other respect, or that such alleged negligence or the negligence of the defendant Illinois Central Railroad Company, or Chicago, St. Louis & New Orleans Railway Company, in directing or permitting its engine or cars or road to be operated while in a defective or dangerous condition, or that any negligence of this defendant in ordering or directing the management of said wreck and killing of Plaintiff's intestate, and defendant charges and alleges that there was no negligence on the part of this Defendant or its co-defendants or either of them.

This defendant has no knowledge or information sufficient to form a belief as to whether Plaintiff's intestate was making or saving large quantities of money and he denies that in the death of his Intestate, plaintiff has been damaged in the sum of $25,000.00 or in any sum.

Paragraph No. 2. Defendant further says the derailment and wrecking of said train by reason of which Plaintiff's intestate was killed was caused wholly and solely by collision of the train with a mule which, without fault or carelessness or negligence upon the part of this defendant or either of its co-defendants, strayed upon the road-bed and track, and which collision resulted from the negligence of Plaintiff's intestate in failing to discover the said mule in time to avoid striking it or in negligently or carelessly failing to avoid collision with it after it was discovered by him, and but for which negligence upon the part of Plaintiff's intestate the said collision and the wrecking of the train resulting in his death would not have occurred.

34 Paragraph No. 3. Further answering herein this defendant says the accident which resulted in the death of Plain-

tiff's intestate is and was such an accident as might naturally and reasonably result from the risks and dangers which were and are naturally incident to the operation of a railroad and to the discharge of such duties as devolved upon Plaintiff's intestate as a railroad engineer in the service of the defendant, Illinois Central Railroad Company, and Plaintiff's intestate knew when he accepted employment with the defendant, Illinois Central Railroad Company, as a locomotive engineer and when he started out upon his run as a locomotive engineer upon the occasion of his injury that there was a risk or danger of such an accident as in fact occurred to him even with the most careful management of the trains and with the greatest care in the proper maintenance and operation of the road bed and other appliances of the Railroad Company, and Plaintiff's intestate voluntarily at the time of accepting such employment as a locomotive engineer and on the occasion of his said injury assumed all the risks and dangers incident thereto including the risk and danger of the unfortunate accident that resulted in his injuries and in his subsequent death, and moreover, Plaintiff's intestate expressly contracted and agreed with the Illinois Central Railroad Company to assume the risks of such accidents and not to claim and damages from said Company or from anyone else for injuries that might result to him from any such accidents while engaged in its service.

Wherefore, Defendant prays to be hence dismissed with its costs herein expended and all proper relief.

F. J. DURBIN,
By H. D. ALLEN, *Att'y.*

35 On the 24th day of January, 1905, the Defendant, the Chicago, St. Louis & New Orleans Railroad Company by its counsel, filed the following Demurrer, which is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Demurrer.

The Defendant, the St. Louis & New Orleans Railway Company, demurs to the petition herein because it does not state facts sufficient to constitute a cause or action against it.

CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO.,
By H. D. ALLEN, *Att'y.*

On the 24th day of January, 1905, the Defendant, Chicago, St. Louis & New Orleans Railroad Company, by its counsel filed the following answer, which is in words and figures following, to-wit:—

Union Circuit Court.

R. W. Sheegog, Adm'r of John E. Sheegog, Plaintiff,

vs.

Illinois Central Railroad Company, & Chicago, St. Louis & New Orleans Railroad Co., Defendants.

Answer of Chicago, St. Louis & New Orleans R. R. Co.

36 The Defendants, Chicago, St. Louis & New Orleans Railroad Company, not waiving its demurrer filed herein but still insisting upon same, for its separate answer herein says that by an Act of the General Assembly &c. entitled &c. approved Feb. —, 1882, it was expressly authorized and empowered to lease to the Illinois Central Railroad Company its railroad, franchises, and property for any term of years or in perpetuity, and to put the lessee in exclusive possession and operation thereof and that afterward, to-wit, on the — day of April, 1882, by an amendment to said Act entitled, &c. approved April —, 1882, the General Assembly of the Commonwealth of Kentucky, declared the said right of lease to be irrepealable and that afterward, to-wit, on the 15th day of September 1897, pursuant to the legislative authority aforesaid the said Chicago, St. Louis & New Orleans Railroad Company leased to the Illinois Central Railroad Company all its Railroad and franchises in the State of Kentucky, and afterward, to-wit, by supplemental lease on the — day of —— 1898, said Chicago, St. Louis & New Orleans Railroad Company, let to Illinois Central Railroad Company all its railroad franchises and property between the City of Henderson in the State of Kentucky and the City of Hopkinsville, in said State, constituting the railroad upon which said R. W. Sheegog was killed to be held and operated upon the same terms as the railroad let as aforesaid on the 15th day of September, 1897.

That in and by said lease and supplemental lease the Chicago, St. Louis & New Orleans Railroad Company let and demised to the Illinois Central Railroad Company the railroads and all franchises appertaining thereto and all the property aforesaid of the said
37 Chicago, St. Louis & New Orleans Railroad Company aforesaid in the State of Kentucky, for the full term of ninety-nine years with right in the lessee to operate the same exclusively of the lessor and have the entire control thereof exclusive of the lessor, where-upon the said lessee as it was expressly empowered to do under the Statutes aforesaid, entered into possession of the said Railroad upon which said Sheegog was killed and took exclusive possession thereof and has ever since had the exclusive possession control and operation thereof by and through its own Officers and employees, and that at the time of the death of said R. W. Sheegog, he was an employee of the said lessee and not of the lessor. The railroad upon which the injury occurred was maintained by the said lessee under the lease as aforesaid and not by the lessor.

and said lessor had no control of the maintenance or operation of the said railroad at the time of said injury of death of said Sheegog.

Paragraph 2nd. Answering further it denies that through the gross or any negligence whatever of itself or of the Illinois Central Railroad Company, or of F. J. Durbin, co-defendants, or any of them, J. E. Sheegog was on the 7th day of May 1903, or at any other time injured to such an extent that he did then and there die; denies that on said date or at any other time or while in the employment of defendant, Illinois Central Railroad Company as Engineer on one of its trains, the said train on which he was so engaged was through the negligence of this Defendant or either of its co-defendants or through the joint gross negligence or carelessness of all three of the defendants herein, derailed, or Plaintiff's intestate thereby killed;

38 denies that by the negligence of its co-defendants or either of them, the said road-bed, rails, tracks, cattle-guard, ties, fences, or right-of-way of this Defendant or of Defendant Illinois Central Railroad Company was allowed to be for a long time, or at all had been or were in a weak, rotten, ruinous, defective or improper condition, and denies that by the negligence of the Illinois Central Railroad Company, the engines or cars of said Company were knowingly or at all allowed to be or remain in an improper or dangerous condition, or said engine or cars to be so constructed as to be in a dangerous condition, denies that any such improper or dangerous condition of the said road, premises or cars was known to this Defendant or to either of its Co-Defendants, and denies that at the time of the wreck and the accident complained of by Plaintiff the same were being operated in a careless manner by all or any of the defendants herein, denies that its co-defendant F. J. Durbin was negligent in running or ordering or directing said train, and denies that by any negligently running or ordering or directing of said train its co-defendant F. J. Durbin, contributed to cause the said accident; denies that the said wreck or the killing of Plaintiff's intestate was caused by the negligence of this defendant or by the negligence of Illinois Central Railroad Company, or any one, in the maintenance of the track, road-bed, engine, cattle-guards, rails, ties or fences, or in any other respect or that such alleged negligence of this Defendant or Defendant Illinois Central Railroad Company in directing or permitting said engine or cars, or road to be operated while in a defective or dangerous condition, or that any negligence of said defendant F. J. Durbin in ordering or directing the management of said train or in failing to give proper direction

39 altogether or at all caused the said wreck or killing of Plaintiff's intestate, and denies there was any such negligence on the part of this Defendant or its co-defendants or either of them.

Defendant has no knowledge or information sufficient to form a belief as to whether Plaintiff's intestate was making or saving large quantities of money, and it denies that in the death of his intestate Plaintiff has been damaged in the sum of $25000.00 or in any sum.

Paragraph 3rd. Defendant further answering says that the proxi-

mate cause of the derailment and the wrecking of the engine upon which Plaintiff's intestate was riding when the action occurred which caused his death was the collision of the said engine with a mule which without fault or carelessness upon the part of this Defendant or either of its co-defendants was upon the railroad track upon which said decedent was operating the engine upon which he was riding as aforesaid, and except for said collision neither said derailment or injury would have occurred.

Paragraph No. 4. Further answering herein this Defendant says the accident which resulted in the death of Plaintiff's intestate is and was such an accident as might naturally and reasonably result from the risks and dangers which were and are naturally incident to the operation of a railroad and to the discharge of such duties as devolved upon Plaintiff's intestate as a Railroad Engineer in the service of the Defendant, Illinois Central Railroad Company, and Plaintiff's intestate knew when he accepted employment with the Defendant, Illinois Central Railroad as a locomotive engineer and when he started out upon his run as a locomotive engineer upon occasion of his injury, that there was a risk or danger of
40 such an accident as in fact occurred to him even with the most careful management of the trains and with the greatest care in the proper maintenance and operation of the road bed and other appliances of the Railroad Company and Plaintiff's intestate voluntarily at the time of accepting such employment as a Locomotive Engineer and on the occasion of his said injury, assumed all the risks and dangers incident thereto, including the risk and danger of the unfortunate accident that resulted in his injuries and in his subsequent death, and moreover, Plaintiff's intestate expressly contracted and agreed with the Illinois Central Railroad Company to assume the risks of such accidents and not to claim any damage from said Company or from any one else for injuries that might result to him from any such accident while engaged in its service.

Wherefore, Defendant prays to be hence dismissed with its costs herein expended and for all proper relief.

H. D. ALLEN,
For Deft C., St. L. & N. O. R. R. Co.

41 At the March Term of said Court, beginning March 6th, 1905, and on the 20th day of March, 1905, the Fourteenth day of said Term, the following order was entered of record, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Order.

The Demurrer of the Defendant, the Chicago, St. Louis & New Orleans Railroad Company and the demurrer of the Defendant,

Durbin, to the Plaintiff's petition are each over-ruled to which ruling Defendants each separately objects and excepts. The Plaintiff filed a separate demurrer to the 3rd Paragraph of the answers of said Defendant and also to the 4th Paragraph of the answer of the Defendant, the Chicago, St. Louis & New Orleans Railroad Company, which being considered by the Court, are each now over-ruled to which ruling Plaintiff objects and excepts. Which said demurrers are in words and figures as follows, to-wit:—

The Demurrer of the Plaintiff to the 3rd Paragraph of Defendant Durbin's answer, is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Demurrer.

42 Comes Plaintiff and enters general Demurrer to the 3rd Paragraph of Defendant F. J. Durbin's answer because same does not state facts or constitute or support a defense to the cause of action stated in Plaintiff's petition.

P. B. MILLER &
HENDRICK & MILLER,
Att'ys for Plaintiff.

The Demurrer of the Plaintiff to the 1st and 4th Paragraphs of the Defendant Chicago, St. Louis, & New Orleans Railroad Company is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Demurrer to 1st and 4th Paragraphs of Answer of Chicago, St. Louis & New Orleans Railroad Co.

Plaintiff comes and demurs to the 1st and 4th Paragraphs of the answer of the Chicago, St. Louis & New Orleans Railroad Company because said paragraphs do not state facts sufficient to constitute a defense to the cause of action stated in Plaintiff's petition herein.

P. B. MILLER &
HENDRICK & MILLER,
Att'ys for Pl't'ff.

The Plaintiff then filed his separate reply to the answer of each Defendant herein, which are taken as controverted of record, and which said replies are in words and figures following, to-wit:—

43 Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Reply to Answer of F. J. Durbin.

Plaintiff, R. W. Sheegog, Adm'r of J. E. Sheegog, deceased, for reply to the separate answer of F. J. Durbin, herein, says it is not true that "The derailment and wrecking of the train by reason of which Plaintiff's intestate was killed was called wholly and solely by collision of the train with a mule," though he says said train struck a mule and was derailed; and he denies said mule strayed upon the track "Without fault or carelessness or negligence" upon the part of any of the Defendants; and he denies that said "Collision" resulted from the negligence of Plaintiff's intestate in failing to discover said mule in time to avoid collision with it after it was discovered by him," and says it is not true that said collision would not have occurred but for the said negligence on the part of Plaintiff's intestate.

P. B. MILLER &
HENDRICK & MILLER,
Att'ys for Pl'ff.

R. W. Sheegog says that he believes the foregoing statements are true.

R. W. SHEEGOG.

Subscribed and sworn to before me by R. W. Sheegog on this March 20th, 1905.

P. B. MILLER,
Ex. U. C. C., Union County, Ky.

44 And the said reply of Plaintiff to the 1st and 4th Paragraphs in the answer of the Defendant, the Chicago, St. Louis & New Orleans Railroad Company is in words and figures following, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, &c., Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Reply to the Answer of Chicago, St. Louis & New Orleans Railroad Company.

The Plaintiff, R. W. Sheegog, Adm'r of John E. Sheegog, deceased, says it is not true and he denies that "The proximate cause of the derailment and the wrecking of the engine upon which Plain-

tiff's intestate was riding when the accident occurred which caused his death was the collision of the said engine with a mule," though said engine struck a mule and was derailed and he denies that said mule was upon said track "Without fault or carelessness" upon "the part of this Defendant," as alleged in the 3rd Paragraph of the separate answer of the Chicago, St. Louis & New Orleans Railroad Company.

P. B. MILLER &
HENDRICK & MILLER,
Att'ys for Pl't'ff.

R. W. Sheegog, Administrator of John E. Sheegog, deceased, says he believes the foregoing statements are true.

R. W. SHEEGOG.

Sworn to before me by R. W. Sheegog, Administrator, on this the 20th day of March, 1905.

P. B. MILLER,
Ex. U. C. C., Union Co., Ky.

45 The parties all then announcing ready for trial, came the following Jury, to-wit:—

J. C. David, D. M. Woods, Thos. Slack, R. McFall, J. C. Cody, H. S. Quinn, W. T. Whitfield, A. M. Benedict, E. J. Wathen, Lawrence Waggener, Wm. Carr, and W. T. Davis, who were duly *w*sorn, tested and accepted and after hearing part of the evidence, and not being able to complete same, were allowed to disperse under admonition of the Court until 9 A. M. to-morrow.

46 At the March term of said Court, beginning March 6th, 1905, and on the Fifteenth day of said Term, March 21st, 1905, the following order was entered of record, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Order.

This cause coming on for further hearing and both sides being ready, the Jury was called and the trial of this cause was resumed. After hearing a portion of the evidence and not being able to complete same, the Jury was allowed to disp*u*rse under the usual admonition of the Court until to-morrow morning, at 9 A. M.

At the March Term of said Court, beginning March 6th, 1905, and on the Sixteenth day of said Term, March 22nd, 1905, the following order was entered of record, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendant-.

Order.

This cause coming on for further hearing and both sides being ready the Jury was called and after hearing the rest of the evidence, instructions of the Court, and arguments of Counsel, and not
47 being able to arrive at a verdict were allowed to dispurse under the usual admonitions of the Court until to-morrow morning at 9 A. M.

At the March Term of said Court, beginning March 6th, 1905, and on the seventeenth day of said Term, March 23rd, 1905, the following judgment was entered of record:—to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Judgment.

This cause — on for further proceeding, and being submitted to the Jury upon the evidence, instructions, arguments of counsel and whole case, and the Jury being called retired to their room and brought into open Court, their verdict, to-wit:—We, The Jury, find for the Defendants, the Chicago, St. Louis & New Orleans Railroad Company, and F. J. Durbin. We find for the Plaintiff against the Illinois Central Railroad Company, The Sum of Eight Thousand Two Hundred and Fifty Dollars ($8250.00).

J. C. DAVID, *Foreman.*

Wherefore it is ordered that the Plaintiff, R. W. Sheegog, Administrator of J. E. Sheegog, recover of the Defendant, the Illinois Central Railroad Company the sum of Eight Thousand Two Hundred and Fifty Dollars, ($8250.00), and his costs herein expended, for which execution may be issued.

48 At the March term of said court, beginning on the 6th day of March, 1905, on the 18th day of said Term, March 24th, 1905, the following order was entered of record: to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Order.

This day came Defendant Illinois Central Railroad Company, and filed its grounds and reasons for a new trial and moved the Court to set aside and vacate the verdict of the Jury and the judgment of the Court herein, and grant a new trial, and the Court having heard the motion and being advised over-rules the same and refuses to grant said Defendant a new trial, to which ruling and judgment of the Court in refusing to grant said Defendant a new trial, and over-ruling its motion, the Defendant objects and excepts, and from said ruling of the Court and from the judgment of the Court on the verdict herein, the said Defendant prays an appeal to the Court of Appeals, which is granted.

Which said reasons and grounds for a new trial are as follows, to-wit:—

Union Circuit Court.

R. W. SHEEGOG, Adm'r, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Motion and Grounds for a New Trial.

49 The Defendant, Illinois Central Railroad Company moves the Court to vacate and set aside the Verdict of the Jury and the Judgment of the Court herein, and grant a new trial upon the following grounds, to-wit:—

First. Because the damages awarded by the Jury are excessive, and appear to have been given under the influence of passion or prejudice.

Second. Because the Verdict is not sustained by sufficient evidence and is contrary to law.

Third. Because the Court erred in admitting evidence of the presence of stock on the grounds adjacent to the Station at Harding and the track on which the wreck occurred, and that cattle using *in* the bottoms and commons at a distance from said places, the Station and track, had access thereto by the Public road and unenclosed lands, and that cattle had been often seen and had been killed at the Depot grounds where wreck occurred, and other material and important evidence which was prejudicial to this Defendant, and to the admission of all which, the Defendant objected and excepted at the time. Because the Court erred in permitting the Plaintiff to give evidence and prove the condition of the Railroad track and bed at

places other than that where the train was wrecked and at times other than at the time of the wreck, and to permit the Plaintiff to give other evidence all of which was prejudicial to Defendant, and to permitting and giving of which, the Defendant objected and excepted at the time.

Because the Court erred in rejecting evidence of experienced
50 railroad Operators and track men that the place of the accident, was at that time, safe for the operation of trains, and that the wreck was not occasioned by the condition of the said road bed or track, and in not admitting to the Jury other material and important evidence, and to all which rulings of the Court the Defendant at the time excepted.

Fourth. Because the Court erred to the prejudice of Defendant in giving to the Jury instructions No-. 2, 3, 4, 5 and 6, to the giving of each and all of which Defendant objected and excepted; because the Court erred in refusing to give to the Jury Instructions asked by Defendant marked E. F. G. H. I. J. K. and L. to which Defendant at the time excepted.

Because the Court erred in proceeding to try this case as to Defendant Illinois Central Railroad Company, after the filing of its petition accompanied by sufficient bond for the removal of this cause to the United States Circuit Court, this Court having no jurisdiction thereafter to proceed further in the case, and also because the Court refused to remove the cause to the Unitd States Circuit Court after the Defendant had tendered and offered to file an additional petition accompanied with sufficient bond which the Court would and did not allow to be filed and which said bond and petition were offered to be filed by the Defendant at the conclusion of the Plaintiff's Evidence, and also at the conclusion of the whole evi-
51 dence, and to which rulings of the Court the Defendant excepted at the times. Because at the conclusion of the Plaintiff's evidence the Court over-ruled the motion of each and all of the Defendadants for an instruction to the jury directing a verdict for each of the Defendants and to which each of the Defendants at the time excepted.

Because the Court erred in over-ruling the demurrers of F. J. Durbin and the Chicago, St. Louis, and New Orleans Railroad Company, to the Plaintiff's Petition to which these Defendants at the time excepted.

ILLINOIS CENTRAL RAILROAD COMPANY,
By Attorneys.

At the March Term of said Court, beginning on the 6th day of March, 1903, on the Twenty-third day of said Term, 25th, 1905, the following order was ordered of record, to wit:

Union Circuit Court.

R. W. SHEEGOG, Administrator of John E. Sheegog, Plaintiff,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Order.

On motion of the Plaintiff and Defendants in this case
52 Miss Virginia Phipps was ordered to take down the evidence stenographically and on request of either party to make a transcript of the evidence from her notes to be used in making up a bill of exceptions and the said Miss Phipps appeared and filed a transcript of the evidence heard on the trial duly certified by her to be correct and attested by the Judge, and she is allowed $15.00 for three days' service in taking the notes and $20.00 for making the transcript to be paid by the Illinois Central Railroad Company and taxed as a part of the costs, and said transcript may be taken as part of the bill of exceptions to the Court of Appeals without being copied into the record and by agreement is to have the same effect as if taken by the Official Stenographer.

Then came the Defendant, the Illinois Central Railroad Company, and tendered its bill of exceptions herein and offered to file the same and requested the Court to sign and certify the same as such and which was done accordingly, and which is ordered filed and is now filed.

J. W. HENSON, *Judge.*

And on the 29th day of March, 1905, on the 23rd day of the March Term of said Circuit Court, the following bill of exceptions was filed by the Plaintiff, Illinois Central Railroad Company, by its counsel, which bill of exceptions is in words and figures following, to-wit:

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Dec'd, Plaintiff,
53 *vs.*
THE ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Bill of Exceptions.

Be it remembered that on the trial of this cause it was agreed by the parties that Miss Virginia Phipps should take down the evidence in shorthand and make a transcript thereof for use in making up a Bill of Exceptions for the Court of Appeals, and that the evidence was so taken. And be it further remembered that she filed a transcript of said evidence certified by her and approved by the Circuit Judge as required by law, and said transcript was and is by order of the Court made a part of the record and of this bill of ex-

ceptions, and contains all the evidence heard, and may be sent with and as a part of the record to the Court of Appeals without being copied.

Be it further remembered that in the trial of this action, the defendants objected to all the evidence of the Plaintiff tending to establish the fact that the road bed and track of the Illinois Central Railroad Company at other places and at other times than the place and time of the wreck of the train in which John E. Sheegog was killed —, and objected to all the evidence tending to show that cattle had been seen on the unenclosed grounds near to the place of the accident and that there were public roads leading from distant unfenced lands, on which cattle ranged, to the said Railroad near the place of the accident, and to all other evidence noted in the report of the evidence, but said objection was over-ruled and said evidence admitted to which the defendant at the time objected and excepted.

Be it further remembered that the Defendants offered evidence tending to prove by experienced railroad men, both operators of trains and section hands and tract supervisors that they were
54 acquainted with the road bed and track at the place and time of the wreck, and by experience knew when a track was reasonably safe for the operation of trains, but the Court refused to admit said evidence as shown by the avowals in said Stenographer's report to which defendants at the time excepted.

And be it further remembered that all the exceptions noted in said Stenographer's report were duly made at the time as shown in said report.

And be it further remembered that it was agreed that the blue print map marked A should be transmitted by the Clerk with the record for use in the Court of Appeals.

Be it further remembered that the Defendant moved the Court on the conclusion of Plaintiff's evidence in chief to peremptorily instruct the Jury to find a verdict for each and all the defendants, which motion was over-ruled, to which the Defendants and each of them at the time excepted.

Be it further remembered that the Defendant, the Illinois Central Railroad Company, objected to each of the instructions given to the Jury marked 2, 3, 4, 5, and 6, which read as follows:

2. The Court instructs the Jury that it was the duty of the Defendant, The Illinois Central Railroad Company, to keep its road bed and track in a reasonable safe condition for the operation of its engines and trains of cars, and to use ordinary care and prudence to keep the track clear of obstructions, and if the Jury believe from the evidence that the Defendant performed these duties they will find for said Defendant.

55 If on the other hand, the Jury believe from the evidence that the Defendant, the Illinois Central Railroad Company, did not use ordinary care and diligence to keep its road bed and track in a reasonable safe condition and reasonably free from obstructions, and because of its negligent failure to do so, if it did so fail, at the time and place complained of in the Plaintiff's petition, its said road bed and track were in a defective and dangerous condition, if it

were in such condition, and same was, or by the use of ordinary care, could have been known to the Defendant in time to remedy said defects and prevent said accident; and that the said dangers and defects, if such there were, were unknown to the deceased, John E. Sheegog, and that same caused his death by the derailment of his engine, and while he was exercising ordinary care for his own safety in passing over it, then the law is for the Plaintiff and the Jury will find for him such sum as they may believe *for* the evidence, will reasonably and fairly compensate the estate of said John E. Sheegog for the destruction of the power of said Sheegog to earn money and if they shall believe from the evidence that the death of said Sheegog was caused by the gross negligence of the Defendant in the particulars hereinbefore set forth, then the Jury may in their discretion find in favor of the Plaintiff such further sum as punitive or exemplary damages as they may believe from all the evidence to be right and proper, not exceeding, however, in all the sum of Twenty-Five Thousand ($25,000.00) Dollars, the amount claimed in the Petition.

3rd. The Court further instructs you that the deceased, John E. Sheegog, in entering the service and employment of the De-
56 fendant, the Illinois Central Railroad Company, as one of its engineers, assumed the ordinary risks and dangers incident to that character of labor, and if you believe from the evidence that his death was caused solely by an unavoidable accident in the operation of the engine and cars, by him, and not caused by any negligence of the Defendant, or its agents or servants in charge of said road bed and track as hereinbefore defined, then in that event the Law is for the Defendant and you will so find.

4th. The Court further instructs you that even though you may believe from the evidence that the Defendant's locomotive, which said deceased was operating, struck a mule at the point mentioned and was thereby derailed, and that by reason of which said Sheegog was killed, yet if you believe from the evidence that the Defendant, the Illinois Central Railroad Company was, at the time exercising ordinary care to keep its road bed and track at said point in a reasonably safe condition then in that event you will find for the Defendant, the Illinois Central Railroad Company.

5th. The Court further instructs you that although you may believe from the evidence that the said Defendant negligently failed to keep its said road bed and track at the point of the injury in a reasonably safe condition for the operation of its trains thereon yet, if you also believe from the evidence that the said Sheegog as engineer in charge of said Locomotive, so negligently operated it that the same was derailed thereby killing him, and that but for such negligence on the part of said Sheegog, the said train would not have been derailed and his death would not have occurred, and
57 then in that event you will find for the said Defendant.

6th. The Court further instructs you that gross negligence as used in these instructions means the failure to exercise slight care, that is, a failure to use such care as a person of common sense and reasonable skill, but of careless habits, would observe in avoiding

injury to his own person or life under circumstances of equal or similar danger to those under investigation.

That by negligence as herein used means the failure to exercise ordinary care, and that by ordinary care is meant such care as an ordinarily prudent person would usually exercise under the same or similar circumstances proven in this case. Given.

But its objection was over-ruled to which it at the time excepted, and that the defendants then moved the Court to give to the Jury the instructions marked E. F. G. H. I. J. K. and L. which read as follows:

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Instructions.

E. At the request of the defendant the Court says to Jury that they should find for the Defendant, unless they believe from the evidence that the Defendant negligently failed to keep its road
58 bed and track where the train left the rails in a reasonably safe condition for operating trains thereon, and that by reason of such neglect the train was derailed and John E. Sheegog the Plaintiff's intestate was killed. If the Jury finds from the evidence that John E. Sheegog was killed by Defendant's negligently failing to keep the track in safe condition as herein-before stated they should find for the Plaintiff such damages as in their judgment will compensate his estate for the loss of his life considering the value to his estate of the Decedent's capacity to earn money and the probable duration of his life, and if the defendant's were grossly negligent in not keeping its road bed and track in a reasonably safe condition the Jury may in their discretion find punitive damages, but in no case exceeding the amount claimed in the petition. Refused.

F. The said Sheegog in accepting the employment as engineer assumed the risks incident to such occupation, and if the Jury believes his death resulted from the hazardous occupation of engineer and not from the negligence of the Defendant as stated in the first instruction they should find for the Defendant. Modified and given.

G. Even though the Defendant negligently failed to keep its track in a reasonably safe condition for operating trains thereon and Sheegog lost his life by reason of such negligence, yet if they further believe from the evidence that said Sheegog, as engineer negligently operated the engine and thereby the train was wrecked, and but for such negligence on the part of said Sheegog, the train would not have been wrecked, the law is for the Defendant and the Jury should so find. Modified and given.

59 H. The Court instructs the Jury that there is no evidence that the engine or cars composing the train on which Plaintiff's intestate was killed were unsafe or defective. Refused.

I. Though the Jury may believe from the evidence that at times the Defendant's road bed at the place where Plaintiff's intestate lost his life was in an unsafe condition, yet if they believe that at the time of the wreck it was in a reasonably safe condition for operating trains thereon, they should find for the Defendant. Refused.

J. Unless the condition of the track caused the wreck, the Jury must find for the Defendant, even though it was not in a reasonably safe condition. Refused.

K. If the Jury believe that the death of John E. Sheegog was caused solely by an unavoidable accident they should find for the defendant. Refused.

L. At the instance of the Defendant, the Illinois Central Railroad Company, the Court instructs the Jury that the Plaintiff has failed to show any right to recover as against it and they will therefore find for the said defendant. Refused.

But the Court refused to give any of said instructions to which the Defendants at the time excepted, and these were all the instructions given, and all that were refused which were offered by Defendant.

59½ And with said transcript there was filed a statement, *an* which is in words and figures as follows:

STATE OF KENTUCKY, *County of Union, set:*

I, J. E. Lilly, clerk of the Union Circuit court certify that the hereto attached Map or diagram is the same used on the trial of the cause of R. W. Sheegog Adm'r of J. E. Shegog, Plaintiff *vs.* Illinois Central Railroad Company and other defendants and the same named in the bill of exceptions to be forwarded and delivered to clerk of Court of Appeals. This July 5th 1905.

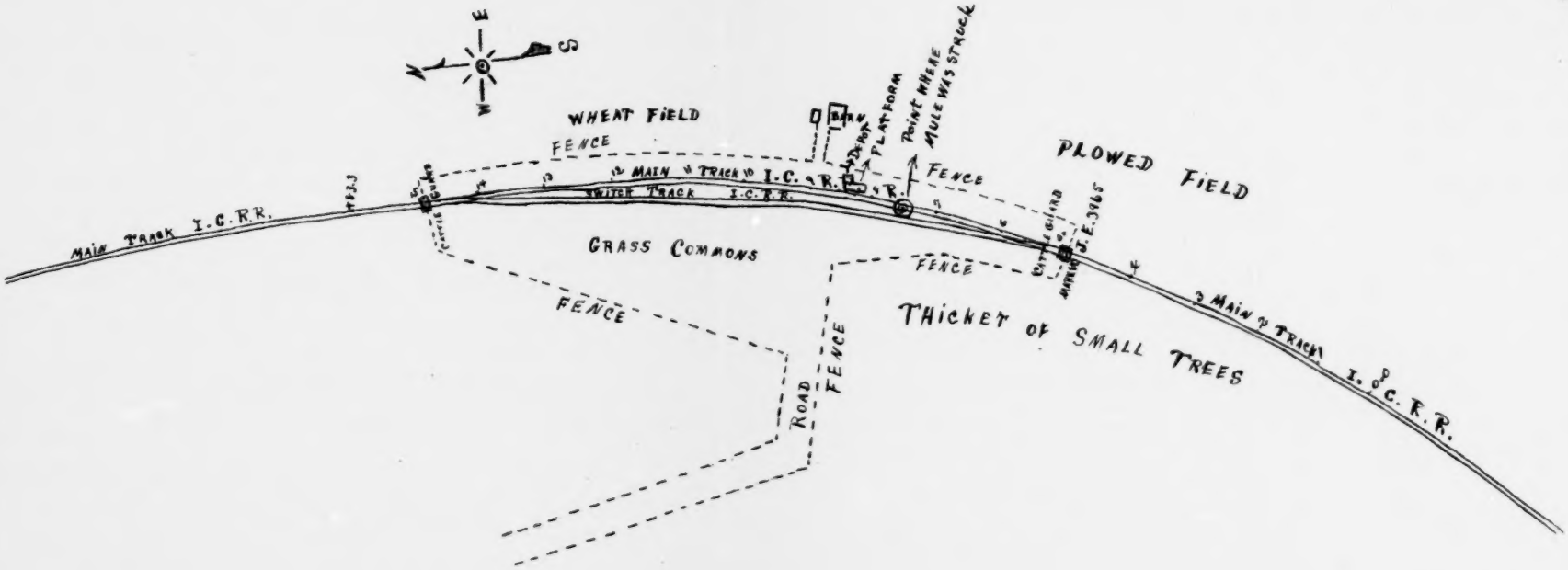
J. E. LILLY, *C. U. C. C.*

(Here follows map marked page 59¾.)

PLAT OF I.C.R.R. CURVE AT HARDING UNION Co. Ky.

SCALE ONE INCH = 240 FEET- S.H. KIMMEL. CE.

JUNE 1903.



No. 5441
I.C.R.R. Co
vs
Sheeran
} p. 5934

A Copy
C. W. McElroy. C. S. U.C.
March 28 - 1905.

60 And be it further remembered, that the Defendant filed its petition for the removal of this cause to the United States Circuit Court for the Western District of Kentucky, and tendered a bond with good security to pay all the costs awarded the Plaintiff if said cause should be removed to this Court on the first day that answer was demandable and asked the Court to proceed no further in this case but remove the same to said United States Court but the Court refused to remove it and proceeded to try the case to which said Defendant excepted; and that upon the conclusion of Plaintiff's evidence the Defendants again moved the Court, and supported its motion by an additional petition and bond as follows:—marked "X" and "Y":—

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Dec'd, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Defendants.

Petition to Remove this Cause to the United States Circuit Court for Western District of Kentucky.

Your petitioner, Illinois Central Railroad Company, states that it is defendant in the above styled action that the matter in dispute therein, exclusive of interest and costs, exceeds the sum or value of $2000.00 that such action is of civil nature wherein the Plaintiff, R. W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, claims the right to recover damages in the sum of $25000.00 for the death of the said John E. Sheegog, deceased, by reason of the derailment of one of your petitioner's trains upon which the said John E. Sheegog, deceased, was acting as engineer,
61 through the negligence of your petitioner all of which claims of damage or negligence your petitioner controverts.

Your petitioner states that in the above mentioned action there is a controversy which is wholly between citizens of different states, which said controversy is between your petitioner who avers that it was at the time of the commencement and still is a corporation created by and organized under and pursuant to the laws of the State of Illinois, and not under or pursuant to the laws of the State of Kentucky, having its principal place of business in the city of Chicago, and in said State of Illinois, and a citizen of the State of Illinois, and not a citizen of the State of Kentucky, and the Plaintiff, R. W. Sheegog, administrator of the estate of John E. Sheegog, deceased, who was at the time of the commencement of this action and is now a citizen and resident of the State of Kentucky, and both said Plaintiff and your petitioner are actually interested in said controversy which is substantially as follows:—

Whether or not your petitioner is responsible in damages to the Plaintiff as Administrator for the death of said John E. Sheegog, resulting from the derailment of one of your petitioner's trains on the 7th day of May, 1903.

Your petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States for the Western District of Kentucky on the first day of its next session, a copy of the record in this case, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto.

And it prays that Court to proceed no further herein ex-
62 cept to accept this petition and approve said surety and bond.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Attorney.*

STATE OF KENTUCKY, *County of Union, set:*

The affiant, Thomas Parish says that he is the Agent for the Petitioner in the above entitled cause; that he has read the foregoing petition and knows the contents thereof, and that the statement and allegations therein contained he believes are true.

THOMAS PARISH, *Agent.*

Subscribed and sworn to before me by the said Thomas Parish on this the 20 day of March, 1905.

LUCY SELLERS,
Notary Public, Union County, Ky.

My Commission expires March 12, 1908.

The said bond is as follows:—

In the Union Circuit Court, Union County, State of Kentucky.

R. W. SHEEGOG, Administrator of John E. Sheegog, Deceased, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Bond for the transfer of this cause to the United States Circuit Court for the Western District of Kentucky.

Know all men by these presents that we, the Illinois Cen-
63 tral Railroad Company as principal and H. D. Allen as surety are held and firmly bound unto R. W. Sheegog, Administrator of John E. Sheegog, deceased, and to all other persons, whom it may concern in the penal sum of two hundred and fifty dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives and assigns jointly and severally firmly by these presents:—

Yet upon these conditions:—The said Illinois Central Railroad Company having petitioned the Union Circuit Court of Union County, State of Kentucky, for the removal of a certain cause therein pending wherein R. W. Sheegog, Administrator of John E. Sheegog, is plaintiff and the Illinois Central Railroad Company, Chicago, St.

Louis & New Orleans Railroad Company and F. J. Durbin are Defendants, to the Circuit Court of the United States in and for the Western District of Kentucky.

Now, if said Illinois Central Railroad Company, your petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court, of the United States if said Court shall hold that said suit was wrongfully or improperly removed, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 21st day of March, 1905.

ILLINOIS CENTRAL RAILROAD CO.,
By H. D. ALLEN, *Att'y.*
H. D. ALLEN, *Surety.*

to remove this cause to said Court, but the Court refused to
61 allow said petition and bond to be filed to which Defendant excepted, and that said Defendant upon the conclusion of the whole evidence renewed its motion to remove this case to said United States Circuit Court, but its motions were over-ruled to which Defendant at the time excepted.

Upon the return of the verdict herein the Defendant on the first day thereafter moved the Court to set aside said verdict and grant this Defendant a new trial on the following grounds:

Copied on Page 48 of this record.

But said motion was over-ruled to which the Defendant the Illinois Central Railroad Company at the time excepted and prayed an appeal to the Court of Appeals from the order over-ruling said motion and from the judgment of the Court upon the verdict of the Jury herein, which is granted.

This bill of exceptions being examined by the Judge is certified to be correct and ordered to be filed as part of the record.

Given under my hand as Judge of the Union Circuit Court, this the 29th day of March, 1905.

J. W. HENSON, *Judge.*

On the 27th day of May, 1905, the following notice was filed by the Attorney for the Illinois Central Railroad Company, which notice is in words and figures following; to-wit:

Union Circuit Court.

R. W. SHEEGOG, Administrator of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and Others, Defendants.

Notice.

65 The Plaintiff in the above styled cause is hereby notified that the Defendant Illinois Central Railroad Company has this day filed in the Office of the Clerk of Union Circuit Court a

schedule showing what parts of the record in this cause the said Defendant wishes to have copied for the purpose of an appeal to the Court of Appeals.

This May 27th, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Att'y.*

And the return of the Constable on said Notice was as follows:

Executed this notice May 27th, 1905, by delivering a copy hereof to P. B. Miller one of the Attorneys for Plaintiff and residing in this County, the Plaintiff and his Attorneys Miller & Hendrick all now residing out of and being absent from this County.

JAMES RODDY,
C. U. C.

Which Schedule is in words and figures following, to-wit:

Union Circuit Court.

R. W. SHEEGOG, Administrator of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendant-.

Schedule.

For the purpose of the appeal to the Court of Appeals granted in this cause, the Clerk of the Union Circuit Court is directed
66 and requested to copy the entire record herein, except the evidence taken down and transcribed by the Stenographer, Virginia Phipps, and which evidence as transcribed the said Clerk will send with and as a part of the record in this cause and without being copied. He will also transmit, without being copied, and as a part of the record the original plat or diagram of the track, &c. at Harding Station used in the trial of this Cause.

This May 27th, 1905.

ILLINOIS CENTRAL RAILROAD CO.,
By H. D. ALLEN, *Att'y.*

And on the 3rd day of June, 1905, the following notice was filed by the Attorney for the Illinois Central Railroad Company, which notice is in words and figures following, to-wit:

Union Circuit Court.

R. W. SHEEGOG, Adm'r of John E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Notice.

The Plaintiff in the above styled cause is hereby notified that the Defendant Illinois Central Railroad Company has this day filed in

the Office of the Clerk of Union Circuit Court a schedule showing what parts of the record in this cause the said Defendant wishes to have copied for the purpose of an Appeal to the Court of Appeals.

This May 27th, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Att'y.*

67 And the return of the Sheriff on said notice was as follows:

Executed on R. W. Sheegog, Administrator of John E. Sheegog by delivering him a copy of the above notice on the 1st day of June, 1905.

W. D. BLACKWELL, *S. U. C.,*
By C. E. BLACKWELL, *D. C.*

STATE OF KENTUCKY, *County of Union, set:*

I, J. E. Lilly, Clerk of the Union Circuit Court, do hereby certify that the foregoing 67 pages contain a full, true and complete transcript of the record and proceedings in the action wherein R. W. Sheegog, Administrator of John E. Sheegog, Dec'd, is Plaintiff, and the Illinois Central Railroad Company, &c. are Defendants, as same appears of record and now on file in my said office.

Witness my hand as Clerk aforesaid this 24 day of June, 1905.

J. E. LILLY,
Clerk of the Union Circuit Court.

Transcript fee, $18.55.

68 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
R. W. SHEEGOG, Adm'r John E. Sheegog, Appellee.

Statement.

This is an appeal from a judgment of the Union Circuit Court rendered at its March Term 1905, towit, on March 23, 1905, and from an order overruling the appellant's motion for a new trial made in the Union Circuit Court at its March Term, 1905, towit, on March 24, 1905. The judgment appealed from is to be found on page 47 of the record herein and the order overruling the motion for a new trial is to be found on page 48 of the record herein.

The parties to this appeal are fully stated in the foregoing caption. The appeal was granted in the court below (record page 48) and no summons need be issued or warning order made on this appeal.

H. D. ALLEN.
TRABUE, DOOLAN & COX.
J. M. DICKINSON.

68½ And with said transcript and statement, there was filed a bill of evidence, and which is in words and figures as follows:

69 Union Circuit Court.

R. W. Sheegog, Administrator of John E. Sheegog, Plaintiff,
vs.
Illinois Central Railroad Company, The C., St. Louis & N. O. Railway Company, and F. J. Durbin, Defendants.

Translation of Stenographer's Notes.

Jury consisted of the following:

1. J. C. David.
2. D. M. Woods.
4. Thos. Slack.
4. R. McFall.
5. J. C. Cody.
6. H. S. Quinn.
7. W. T. Whitfield.
8. A. M. Bendeict.
9. E. J. Wathen.
10. Lawrence Waaggener.
11. W. M. Carr.
12. W. T. Davis.

Evidence of R. W. Sheegog, Examined by John G. Miller, Plaintiff's Att'y.

Ques. State your name?
Ans. R. W. Sheegog.
Ques. You are the Plaintiff in this action are you not?
Ans. Yes sir.
Ques. Where do you reside?
Ans. Central City, Muhlenburg County, Kentucky.
Ques. You know John E. Sheegog?
Ans. Yes sir, he is my son.
Ques. Do you remember the date of the occasion of his death?
Ans. Yes sir, May 1st, of last year.
Ques. What was his occupation?
Ans. Engineer.
Ques. How long had he been a locomotive Engineer?
70 Ans. About 8 years, probably over.
Ques. What was his age?
Ans. 28 years old the month he was killed.
Ques. Upon what road did he run his engine?
Ans. He had not run over here but a little while.
Ques. Which road did he run on; the main line or on the branch line?
Ans. He run on the main line from Paducah to Central City.
Ques. You say a little while, what do you mean by that?
Ans. Just a few trips.
Ques. What do you mean by saying "over here"?
Ans. I mean on this Branch, from Henderson to Princeton.
Ques. This line runs by what place, that is does it strike the other line?
Ans. It runs by Princeton.
Ques. And how long had he been running on this branch line?
Ans. But a short time.

Ques. Did he have a regular run?

Ans. No, sir, he was not a regular man over here. He had a regular engine and a regular run on the main line.

Ques. Was his run over here, what time was his run over here? Day or night?

Ans. It was in the night I understand.

Ques. Were you at the point where the wreck occurred in which he was killed?

Ans. Yes, sir, I got there about 11 or 11:30.

Ques. 11:30, when?

Ans. Next day after the wreck.

Ques. Do you mean to say that you got there on the 8th?

71 Ans. Yes, sir.

Ques. Refresh your memory now, Mr. Sheegog, was he not killed on the morning of the 7th?

Ans. Yes, sir, I guess it was the 7th, I do not remember, I was in no condition to think about that at the time.

Ques. What I want to know, Mr. Sheegog, is whether or not you was at the wreck the same morning it occurred?

Ans. Yes, sir, I was there the same morning.

Ques. Mr. Sheegog, when did you hear of the trouble?

Ans. I got a telephone message at 3 o'clock.

Ques. You got a telephone message that he had been killed just then?

Ans. Yes, sir.

Ques. How long was it before you started to the place where the accident occurred.

Ans. I took a train in about ½ hour after I got the message.

Ques. What train did you take, Mr. Sheegog?

Ans. I came over on the through freight train to Princeton, and from Princeton, on another freight train to the wreck.

Ques. You say you reached the point of the wreck on the morning he was killed before dinner?

Ans. Yes, sir.

Ques. When you say you got the news at 3 o'clock, wa*t* it 3 in the afternoon or in the morning?

Ans. It was 3 in the morning.

Ques. Mr. Sheegog, when you arrived at that place what did *did* you find?

Ans. I found a terrible wreck.

Ques. What was there?

72 Ans. I could not explain. The wrecker was there. When we got there the cars were all piled up on top of the engine and my son down under the engine.

Ques. He was not yet gotten out?

Ans. No, sir, he was not gotten out until 2 o'clock.

Court instructed that the Jury should not consider the last answer.

Ques. What wages was your son making at that time, Mr. Sheegog?

Ans. He was making from $130.00 to $150.00 per month.

Ques. What were his habits, health and etc.?
Ans. He had no bad habits at all, he had good habits. Never drank, smoked, nor went in bad company.
Ques. What about his physical condition?
Ans. He was a big stout young man.
Ques. You say he was a big stout young man?
Ans. Yes, sir.
Ques. I asked you whether or not he had good health?
Ans. He was quite healthy. He never had any sickness.
Ques. Did he work regularly?
Ans. Yes, sir.
Ques. What were his habits as to economy?

Objected to by Defendants' Attorney and question withdrawn by Counsel for Plaintiff.

Ques. What were his habits as to preparing himself for his avocation in life? Whether or not he was studious and attentive to his profession?
Ans. Yes, sir. When he was off his run, no matter how tired he was, he would take his books and go to studying.
Ques. Mr. Sheegog, I will ask you whether or not you have been engaged in railroad service?
73 Ans. Yes, sir.
Ques. For how long?
Ans. 30 years.
Ques. In what different capacities?
Ans. Several. I worked on Section; in the mechanical department, Pump department, fired, and handled engines, and wiped engines.
Ques. You say you have fired, what do you mean by that?
Ans. I have fired out on the road, handled engines in the yard; switch engines.
Ques. What else have you done?
Ans. Done calling, and have done most everything in the mechanical department.
Ques. The mechanical department, am I correct or not, is in which the engines are handled all together?
Ans. Yes, sir, all together. The pump is in the road department.
Ques. I will ask you whether or not your capacity is such that you would know what is a proper pilot for an engine; what is a reasonably safe pilot?

Court over-ruled objection of Defendants' attorney, to which defendants excepted.

Ans. I should think so. I have repaired engines, helped repair cars.
Ques. Is there such a pilot known as a "Stub" pilot?
Ans. Yes, sir.
Ques. Well, describe it to the jury; what sort of a pilot is it?

Ans. A stub pilot is a short dumpy pilot; just a little slant-
74 ing; the old head pilot is the pilot slanting up long. The stub pilot is only tolerably slantways.

Ques. I will ask you to state which is the proper pilot for a train?

Court sustained Defendants' objection and excepted to by Plaintiff's Att'y.

Ques. I will ask you then which is the safer pilot as to preventing wrecks on account of striking stock?

Court sustained objection and excepted to same as above.

Ques. I will ask you then, which in your opinion, is the safest to prevent wrecks on account of striking stock; the stub or the long pilot?

Ans. The long pilot in my opinion is safer than the stub pilot. It is more reliable. It slants out over the rails, and when it strikes a cow, mule, or horse, it goes under it and throws it off the track.

Ques. Well, Mr. Sheegog, why is it better than the stub pilot?

Ans. Because the stub pilot is a stubby pilot, and is more liable to throw the train off the track when it struck a mule or cow, or anything.

Ques. Why do you say this?

Ans. Because when this stubby pilot strikes an animal it knocks it down on the track in front of the engine, and makes it more likely to throw the engine off the track. This pilot is liable to bend under the engine and break off.

Ques. What kind of a pilot was used on this engine, do you know?

Ans. No, sir.

Ques. What do you say you called the other, the standard pilot?

75 Ans. Yes sir. The long pilot is what is called the standard pilot.

Ques. You say you have worked on the track on section work?

Ans. Yes sir, I have worked some little on the track a good many years ago.

Ques. Do you think you know when a track is put in the usual and safe condition?

Ans. Yes sir, Most any railroad man that has railroaded at all would know it.

Ques. What is "tamping" the tracks?

Ans. Putting ballast underneath the ties.

Ques. What is "Ballast"?

Ans. There are different kinds of ballast, rock ballast, gravel, and cinders.

Ques. What is the result if the track is just laid down upon the dirt railroad bed and allowed to remain so for several months without having ballast put beneath the ties?

Objected to by Defendants' Attorney as being too general.

Question with-drawn by counsel for Plaintiff.

Ques. Mr. Sheegog, Just tell what is the proper way in which to ballast and keep the track in order?

Ans. The track to be kept in order ought to be well ballasted with stone, or rock, and it ought to be tapered up in the middle to keep the water all drained off on both sides, or the water would go under the ties and make them slip, cause the ground to become soft.

Answer objected to by Defendants' Attorney, and Court over-ruled same to which defendants excepted.

Ques. You are the gentleman who is the Administrator of your son?

76 Ans. Yes sir.

Cross-examination by H. D. ALLEN, Attorney for Defendant-:

Ques. Mr. Sheegog what are you doing now?

Ans. Well, I am running a team in Central City.

Ques. You are a teamster in Central City?

Ans. Yes sir, I have a team.

Ques. I will ask you this question; you say most every road man ought to know when the track is properly ballasted?

Ans. Yes sir.

Ques. You think a road man ought to know better than any one else?

Ans. Yes sir, He is more competent from his observation.

Ques. Then you think he ought to know better than any one else; especially if he is on the ground and has charge of it?

Ans. Yes sir.

Ques. I understood you to say that the trouble with the shorter or stub pilot is that it is more liable to double under as it struck a cow or mule, and make it more liable to break off.

Ans. Yes sir. It is more liable to break off.

Ques. Why is it more liable to break off?

Ans. Well, this stub pilot is short in this shape, indicating by his hand, and when it struck it would double under and break off up as far as the engine where it was bolted on to the engine. Probably it would strike on the ties and double under the engine.

Ques. Is the danger in the stub pilot greater than in the long pilot?

Ans. Yes, sir.

Ques. If that were true, if this stub pilot bent under and

77 broke off, would all the slats break off?

Ans. Yes sir; liable to.

Ques. Square off?

Ans. Yes sir.

Ques. Would it not tear the pilot loose from its attachments; and loose from the engine?

Ans. Yes sir, It is liable to.

Ques. Would not the Pilot braces be torn away when they break there?

Ans. Yes sir.

Ques. Is it not a fact that it would be; if that result would happen with the Pilot, would it not be absolutely cleared of fastenings?

Ans. Well, it might.
Ques. That is the most probable result?
Ans. Yes sir.
Ques. That is the difference between the long and short Pilot?
Ans. Yes sir.

Mr. JOHN G. MILLER, Attorney for Plaintiff:

Ques. Is that the only danger you mentioned? I will ask you whether or not it would be likely to knock a cow, mule or horse down in front of the train?
Ans. The stubby Pilot knocks them in front and runs over them.
Ques. Well, Mr. Sheegog, how does the sloping or long pilot do?
Ans. When it strikes the animal it throws it off the track. It slopes out long in front and runs under the animal and throws it off to one side.

Moss RUDD, Witness for Plaintiff, Examined by JOHN G.
78 MILLER, Atty. for Pltf.

Ques. Mr. Rudd, where do you live?
Ans. On the Harding Farm.
Ques. In this County?
Ans. Yes sir.
Ques. How long have you lived there?
Ans. Two years. A little better than two years.
Ques. Two years?
Ans. Two years, I think, the 7th of last January.
Ques. Were you living there at the time of this wreck on the night of May, the 7th, 1903?
Ans. Yes sir.
Ques. How long had you lived there prior to this wreck?
Ans. Since January.
Ques. With the Court's permission I would like to get you to give a description of that Railroad and your Residence to the Jury. Here diagram of the location of the railroad is made.
Ans. I live about 500 or 600 yards below the road running up to Harding Station. There is a little corner left in there with the Railroad. It is the commons there; there is nothing on it and it is not fenced. There is a fence part of the way and the public road crosses the track right this side north of the station and then runs on down by my barn and Scales. There is a road through there that crosses the railroad up above the station, but I am not sure that it is a public road.
Ques. Does grass grow in the right-of-way?
Ans. Yes, on both sides of the railroad track.
79 Ques. Is there anything to prevent cattle from coming in this part along by the side of the railroad track from this Cattle guard to that?
Ans. It is fenced there and then here. It is fenced on the bottom side. That is on this side of the railroad. What is known as the Harding Farm is on either side. Down this road it is in bottom where the cattle can range.

Ques. Then stock can go up here on this corner?

Ans. Yes sir, stock of all kinds can go up there to this crossing.

Ques. Then they can use back here in this commons?

Ans. Yes sir.

Ques. I will ask you if cattle had not been frequently killed there.

Court sustained Defendants' Objection.

Ques. Is there anything to prevent cattle or mules or anything coming in here from the public roads from coming in and using on this?

Ans. No sir.

Ques. Mr. Rudd, what was the condition prior to this wreck of the railroad track from this cattle guard this side of the Station towards Morganfield, with reference to ballast?

Defendants Objected. Court ruled question as being incompetent. Plaintiff excepted. Plaintiff makes avowal that the witness would state that the road was ballasted with the rock ballast from the north to the cattle guard on the north and from the south to the cattle guard on the south.

Ques. Tell the Jury whether or not the track was ballasted from this cattle guard this side of the station to the bridge at the other side?

80 Ans. I can not say as to the road crossing here. I do not know whether it was for sure or not. From the crossing on the south side it was not.

Ques. You say then from the dirt road crossing?

Ans. I mean there was no dirt piled up over the ties.

Ques. Mr. Rudd, do you mean to say that the track was not ballasted from the dirt road crossing over this side of the bridge?

Ans. Yes sir.

Ques. Did the train get wrecked between these points?

Ans. Yes sir.

Ques. Did you go down there after the wreck?

A. Yes sir.

Ques. State to the Jury there, Mr. Rudd, where the mule was struck on this map? And what was the condition there?

Ans. He was struck something like 50 yards below this Station, where it cut the mule in two, and left a part of it on the *the* track and a part was down on the outside of the ties. The engine staid on the track until it got down here somewhere near this switch; here it left the track and the engine was left there on this side of the ditch, or bridge and about 40 or 50 feet out. The most of the wreck was piled up on this side of the bridge.

Ques. You say Mr. Budd, that it struck the mule there? About here?

Ans. Yes sir, I should think about there.

Ques. Did you see any part of the mule there?

Ans. Yes sir, the head and fore shoulders laid right by the side of the track.

81 Ques. Which direction was the train going, Mr. Rudd?
Ans. South. Going South.
Ques. It struck the mule at this point, you say, 40 or 50 yards below the Station?
Ans. Yes sir.
Ques. You say the track was not ballasted from there on down to the cattle guard; from this road here on down?
Ans. No sir, it was not ballasted.
Ques. How was the mule cut in two?
Ans. It was cut clean, looked square off.
Ques. What part of it was cut off?
Ans. The head and fore shoulders was cut off and over to the east side of the track going south.
Ques. How close to the track was the head and fore shoulders lying?
Ans. Something like three or four feet from the ties.
Ques. Mr. Rudd, what time of night were you summoned to go to that wreck?
Ans. It was something near one o'clock.
Ques. State whether or not you went down there?
Ans. Yes, I went down to the wreck.
Ques. Did you say that the head and shoulders of the mule was 3 or 4 feet from that point there? (Point indicated on map.)
Ans. Yes sir.
Ques. Mr. Rudd, I will ask you what the condition of the ties were at that point and below there where the train left the track entirely as to whether the ends of the ties were tamped or not?
Ans. Well, I do not know how you would want me to
82 explain that, some of the ties were on the ground and some of them were not. There was no dirt covering on the ends of the ties.
Ques. I will ask you if the ties stood up over——; how were the ties laid and the rails, and was there a fill left in the side of the rails?
Ans. The ties were laid down on the ground, on the road bed, and the trains running over this had worked the dirt up almost to a level in some places with the ties, something like on a level between the ties, and some was something like ½ or ¾ exposed in places along.
Ques. You say in places ½ or ¾ of the ties stood above the dirt between the rails?
Ans. Yes sir, something like that.
Ques. I will ask you if you noticed anything, any blood or hair or anything on the ties there just after the mule had been struck?
Ans. I noticed it on one or two ties, one tie I am sure.
Ques. Explain to the Jury what you saw, and how it appeared?
Ans. I just saw hair and blood on the tie and it looked like something had wedged against it. Ties are square, and you could see where the hair was left on the tie.
Ques. You say that after the mule was cut in two, you saw a tie there where the other part of the mule had been wedged against it?
83 Ans. Yes sir.
Ques. Mr. Rudd, did you ever observe the effect of trains

on that road when *the* they were passing over it at that point in front of the Station and on down to that point there? (Point indicated on map.)

Ans. Yes sir.

Ques. Well, what was the effect?

Ans. The cars would seem to rock and sway, from side to side.

Ques. When was this?

Ans. I cannot say as to that. I have noticed them there at different times. I have been sitting at the depot when the train would pass by and I noticed it several different times.

Ques. I will ask you if the track was in as good condition as it was down here, that is in front of the depot?

Ans. Something just the same, Yes.

Ques. In reference to ballast under the ties?

Ans. Well, I can not say as to that. For right in front of the Station here it is more on a level and the train would not sway so much, it would sway more here than it would in front of the Station.

Witness stated that the condition of the track in front of the Station was something better than it was south of the Station.

Ques. Mr. Rudd, I will ask you to state whether the road bed is level there at this particular place, or whether there is a rise?

Ans. As you go south, the road as you leave the Station seems to make a gradual rise. There is more of a rise here. At the
84 road crossing it is pretty near level. As you leave the road crossing there is a gradual rise.

Ques. I will ask you, Mr. Rudd, if the dirt does not wash between the ties. Was it or not washed from between the ties?

Ans. Yes sir.

Ques. How much?

Ans. Between some of the ties it was washed so that ½ or ¾ of the tie was exposed. One of these ties I saw where the hair was caught on the tie.

Ans. Mr. Rudd, you stated, in answer to a former question, that you had observed that the cars would rock when passing over the track there at that point. Explain to the Jury how much?

Ans. Well, I could not say how much, but it would rock and sway backwards and forwards. It was probably a month before the wreck when I remember of noticing it. When the train went over the track it seemed to sway down and then rise again.

Defendant Objected to answer. Court over-ruled objection and Defendant excepted.

Ques. I will ask you if the track would dip down here where the switch come in just below where the mule was struck as much as up here; was there any dipping there?

Ans. I do not think there was, I do not remember whether that would dip there or not, I can not say.

Ques. Mr. Rudd, did you notice any other places, or result of the

train going over there at that point in front of the Station
85 and where the mule struck with reference to the track sinking and springing?

Ans. Yes sir, I had noticed it when I would see the trains pass by.

Ques. About how long before the wreck?

Ans. I can not say as to that how long it was. About a month maybe.

Ques. From that time until the wreck had they fixed the road there?

Ans. I did not pay any attention to that. Up at the Station when the train was passing I saw the track sway up and down.

Ques. Before the wreck?

Ans. Yes sir.

Ques. Did you state to the Jury as to the condition of the road as to being low and wet; whether there was as much water stood there where the mule was found there, and there where the public road crossed the track?

Ans. There was water standing on this side, and water would stand over there some. (Indicated on map.)

Ques. What kind of dirt was there; was there a fill?

Ans. Yes, just a little fill, a gradual fill.

Ques. Now, Mr. Rudd, I will get you to state whether or not these ties worked up and down; did you notice anything of that there?

Ans. I noticed that the ties were up above the dirt where I noticed this mule being on the ties. I noticed it there.

Ques. When you got down to the wreck there, Mr. Rudd, did you notice how many cars there were where the engine was piled?

86 Ans. I do not remember. I did not notice at the time. Seems to me like the Conductor told me.

Ques. Just state to the Jury there, where the engine was and the condition of the cars, and the railroad and all that you saw there?

Ans. Well, the engine laid about 30 or 40 yards, I think, south on the west side of the track, then there was some cars that had left the track on the north side of the bridge, and the track was all torn up for about 30 or 40 yards, I guess, from the South side of this Cattle Guard to where it left the track.

Ques. What condition were the cars in, Mr. Rudd.

Ans. There was some left standing on the track and some of them were piled up. There was one car piled on top of the engine and side of one car was down by the side of the engine.

Ques. How far was the engine from this cattle guard, and how far from the side of this track?

Ans. Well, I do not remember exactly. The head of the engine was turned just a little back, pointed a little northwest, the head of the engine was a little over in the field.

Ques. How many of the cars were in the wreck?

Ans. 7 or 8 I could not say which. They were all piled up, some of the cars were left on the track. I could not say. I counted them at the time but I do not remember exactly.

Ques. Did you find any mule tracks on the ground there?

Ans. Yes sir.

Ques. Where were they?

87 Ans. They were something like 10 or 12 feet from where the mule was cut in two.

Ques. On which track?

Ans. On the main track.

Ques. In which direction from where the mule was cut in two, north or south?

Ans. North.

Ques. How many tracks did you see?

Ans. There were three tracks, one hind foot and two front feet, north of where it was struck.

Ques. Which way were the tracks pointing, in which direction did the mule appear to be going?

Ans. South, the tracks pointed South.

Ques. How far was it from where the piece of mule was found to where the engine lay?

Ans. It was something like 90 or 100 yards to where the engine was laying.

Ques. How far was it from where the mule was cut in two to where the first mark of the wheel was on the cross ties?

Ans. I do not remember, 3 or 4 feet, it might have been 6 or 8; it was something like that to where we could see a little mark on the ties on the outside of the rail.

Ques. How many marks could you see there? One or two.

Ans. It was marked all the way down from where it struck the mule on; It was marked from where it left the track, it looked like one wheel mark on the outside of the rail.

Ques. After you got down to the switch there, Mr. Rudd, what was the condition of the track then from there on?

Ans. It was all cleaned up, torn away. The track was all torn up, the cattle guard was swept away. The rails were bent

88 around to one side, and the cross ties all swept away.

Ques. What was the condition of the cross ties there? (Indicated on map.)

Ans. A good many of them were south of the cattle guard here and a good many of them were swept down here, some were scattered about.

Ques. What was the condition of these ties as to being sound?

Ans. Some of them were broke in two, and some whole ties.

Ques. Did you take up any of these ties?

Ans. No sir.

Ques. Did you see any one take up any of these ties?

Ans. I saw the section hands take them up in cleaning up there.

Ques. Now, Mr. Rudd, to refresh your recollection, did you take one of these ties up and put it into a sack?

Ans. Yes, after the wreck.

Ques. Where were these ties put?

Ans. Which ties?

Ques. These ties that were swept from off the track?

Ans. Some of them were put back in the track and some were piled along the side of the track to be burned up.

Ques. Did you get the tie that you speak of putting in a sack out of that?

Ans. Yes sir.

Ques. How many ties were gotten out of there to your knowledge?

Ans. I do not know, I never counted them, there was two or three piles I did not count them, there was as many as two piles any way. I did not know how many.

Ques. Did you take some of these ties and put them under
89 your corn crib or not?

Ans. Yes sir.

Ques. Were they rotten or sound?

Ans. They were rotten at one end; the other end was good enough to hold. The part that was in the ground was rotten and the end that was on the outside looked very good but the tie was rotted in two in the middle.

Ques. How many pieces did you get of these ties?

Ans. Two or three pieces at different times.

Ques. These ties that you got, were they not about like the rest of them?

Ans. Yes, they had the mark of the wheel on them.

Ques. You identified them as the tie- that the wheel had run over?

Ans. Yes sir.

Ques. Mr. Rudd, I will ask you if you took any precaution to put these ties back and compare them to see if these were the ties that came out of that track?

Ans. No sir, I never noticed that. I noticed the same mark on them. The mark of the wheel.

Ques. Mr. Rudd, can you state about how many feet it was from the place where you saw these mule tracks down the railroad to cross ties where you saw the hair?

Ans. Yes, that was something like 10 or 12 feet. The best of my judgment is that it was 10 or 12 feet.

Cross-examination of witness by JOHN W. LOCKETT, Att'y for Defendant:

Ques. Mr. Rudd, does this diagram compare with the location of the track there?

90 Ans. Pretty fair, yes sir.

Ques. You say it was 40 or 50 yards south of the platform south to where the mule was cut in two?

Ans. Yes sir. It was about that distance, maybe 60 yards. I can not say exactly.

Ques. From the lead rails there to the cattle guard, how far was that?

Ans. Something like 30 feet, I suppose.

Ques. And the engine was piled rather off from this side of the track, some 30 or 40 yards south of that with the head of the engine turned to the Northeast?

Ans. Yes sir.

Ques. Now, you say from the lead rails south to where the engine was off the track, the track was just swept from where it left the track here?

Ans. Yes sir.

Ques. And you say some of the ties were rotten and some of them sound?

Ans. Yes sir.

Ques. Where did you get those ties?

Ans. We got them up here something like about where the mule was; We got them from the west side of the track.

Ques. When did you get them?

Ans. After the wreck.

Ques. Just about how long?

Ans. It was after the wreck. I do not know exactly how long.

Ques. Was it in two or three weeks?

Ans. I do not remember.

Ques. Who was with you when you got them?

91 Ans. A. O. Stanley.

Ques. You went down there to get them?

Ans. Yes, sir.

Ques. Did you know whether these ties had been taken out of road after the wreck or not?

Ans. Yes, sir, they had been, I am satisfied.

Ques. Where did you find these ties?

Ans. We found them in a pile over on the west side of the railroad.

Ques. How far from the point where the *point where the* mule was struck?

Ans. I could not say, something between where the mule was struck and where the cattle guard was.

Ques. Did you take out the ties that you afterward got?

Ans. No, sir.

Ques. Where the ties come from you do not know?

Ans. No, sir. The mark of the wheel was on them.

Ques. You do not know who took them out do you?

Ans. No, sir.

Ques. Who called your attention to them?

Ans. A. O. Stanley.

Ques. Did he bring them to you?

Ans. No, sir, we both went there together.

Ques. Who made that pile?

Ans. The Section hands, I suppose.

Ques. Was it a pile of refuse that was made in tearing up the railroad bed, or was it a pile of old ties that had been taken out and new ones placed in?

Ans. It was a pile of the ties that had been taken out of

92 the wreck and piled up there to be burned.

Ques. Mr. Rudd, I will ask you whether or not, if from the point where that mule struck, if there were not at least four cars remaining on the track between that point and the switch?

Ans. I can not say how many were there, there was some; the caboose was left right opposite this depot. You could step off the platform right into the caboose. There where the track was torn up one of the cars was off the rails, that is one end of it was off.

Ques. Did you find a link of cars from the switch back to the caboose; now, is it not a fact that from the point of the switch from where the track——

Ans. I do not remember, I did not notice.

Ques. W' called your attention to the track that morning?

Ans. Tl. Conductor.

Ques. The Conductor, Mr. Durbin?

Ans. Mr. Durbin, I believe that was his name.

Ques. And you say that this road crossing up here to the station was nearly level at the station, and that going south the lead rails and road was built on a gradual rising embankment, gradually getting higher as it got to the cattle guard?

Ans. Yes, sir.

Ques. How high was it at the highest place?

Ans. More like three or four feet here, and along here not so much.

Ques. Was there some incline in the track from the depot in the direction of the cattle guard?

Ans. Yes, sir.

93 Ques. You spoke, Mr. Rudd, of some places north of the depot platform where you had observed the track go down a little when the cars passed over it. How far north of the platform was that?

Ans. Well, I could not say. I just noticed it when I would happen to be down along there. That was sort of a hollow, or rather bottom on each side of the track there. I do not know just how far it was. There was soft places all along in the hollow.

Ques. About how far from; did it extend north and south?

Ans. Yes, sir, at the time I noticed this place it was all soft there and all soft below it.

Ques. How long before this wreck was it when you noticed this?

Ans. Something like a week. I do not remember exactly.

Ques. Now, Mr. Rudd, might it not have been two months?

Ans. No, sir, not hardly that long.

Ques. Might have been a month?

Ans. Yes, it might have been a month.

Ques. From that time on it was dry, it got dry enough to plough?

Ans. Yes, sir.

Ques. When the wreck occurred, is it not a fact that from the road crossing on to where the cattle guard, on to the lead rails, was it not dry?

Ans. No, sir, I did not examine it, I do not know.

Ques. You can not state as to the condition of the road then but it was soft one month before this wreck when you examined it?

94 Ans. I never went down there to examine it specially any time, it did not concern me in any way.

Ques. You never examined it?

Ans. No, sir.

Ques. How many acres did you say there was in this field?

Ans. Something like two acres, just guessing at it, on this side of the road.

Ques. Whose mule was that?
Ans. Belonged to me and Messrs. Waller.
Ques. Where had he been the day before?
Ans. He had been in the lot the day before. The last time I seen him he was in the lot the night of the wreck.
Ques. You say the last time you saw him, he was in the lot?
Ans. Yes, sir, until he was cut in two.
Ques. Your stable is on the west side of the track?
Ans. Yes, sir, up by my house.
Ques. How far from the depot?
Ans. About six or seven hundred yards.
Ques. The mule had gotten out of the lot?
Ans. Yes, sir.
Ques. You had not turned him out?
Ans. No, sir.
Ques. Was this a breechy, rougish mule?

Plaintiff's objection sustained by the Court, to which Defendants excepted and Defendants make an avowal that the witness would have stated that the mule was breechy and rougish.

Ques. What time of night were you called up?
Ans. Something like 1 o'clock.
Ques. Do you remember whether or not it was a clear night?
95 Ans. It was perfectly dark, the best I remember.
Ques. Was there any moon that night?
Ans. The best I remember it was dark. We had lanterns. We took lights with us when we went to the wreck. I do not remember exactly what about it.
Ques. Now, Mr. Rudd, I will get you to state as near as you can how many yards, or how far it is from the platform to where the mule was struck?
Ans. It was something like 50 yards, I suppose.
Ques. How far is it from that point, the point where the mule was struck down to the lead rails?
Ans. It was about 60 yards, I guess.
Ques. How far was it from the lead rails down to the cattle guard?
Ans. About 30 feet.
Ques. How far from the cattle guard to where the engine lay?
Ans. About 30 or 40 yards.
Ques. Did you know how many cars in all were in that train?
Ans. No, I do not know; I knew at the time, but I disremember.
Ques. Mr. Rudd, you spoke of the hair upon the cross ties some distance from where you saw a part of the mule on the east side of the track as if the mule had been wedged against it?
Ans. Yes sir. It looked as though it had been cut there and I noticed the hair on the ties possibly where the mule was cut in two.
Ques. Did you notice any hair on any other of the ties?
Ans. No, I can not say that I did.
96 Ques. Now, these ties, if I remember right, you stated were exposed ½ to 2/3 of their thickness on each side of the bridge?

Ans. Well, in the Spring while it was wet I noticed them, and some of them the dirt had washed away from them and something like ½ or 2/3 of the ties were exposed; the dirt had worked from the ties and left a little space there between the dirt and the ties. The dirt washed out between the center of the ties.

Ques. Then from the center of the ties you say the dirt was sloped down from the center to the bottom of the ties and when it got to the rail there was 2/3 of the ties exposed?

Ans. No sir, in the center. Between these two rails; between the two steel rails. ½ or 2/3 of the ties was exposed in the center all along.

Ques. Then in the center at the highest point it come up to the top of the ties?

Ans. In the center it was up about on a level with the ties but it had washed from either side so that 2/3 of the ties between the rails was exposed.

Ques. Was the dirt sloped enough for the water to go under the ties from the center?

Ans. On the west side it had.

Ques. Did you know whether it had on the left?

Ans. I do not remember. I think it washed up some but on the west side it comes in under this switch, but on the other side there is more drainage for the water.

Ques. Which side of the track is the switch on?

Ans. The switch is on the west side of the main track.

Questioned by JOHN G. MILLER:

97 Ques. Mr. Rudd, is there any cattle guard between where the public road crosses and that water gap down there to prevent stock from getting in on this occasion?

Ans. No sir.

Ques. How far had the engine left the track, that is how far was it from the track?

Ans. The track is about 40 feet from the center of the road bed to this fence, and it was on this side of the cattle guard here about 30 or 40 yards over next to the fence, about 35 or 40 feet, I suppose.

Ques. Now I will get you to tell the Jury, as to what was the condition of the ties along here about where the engine left the track as to the dirt being against the ties or not in the middle of the track?

Ans. Well, along there the dirt was washed from the ties and there was a space you could stick your hands down in between the dirt and the ties, and then it washed out to the rails.

Ques. Then on both ends it was much more?

Ans. Yes sir.

Ques. Well, Mr. Rudd, you say then that the dirt was up something like a level with the ties in the center in some places and that there were spaces washed out on either side of the ties and had washed down sloping under the rails to the ends of the ties?

Ans. Yes sir. It had washed on each side of the ties in the center

of the track between the ties. There was a space left on each side of the ties from the dirt.

Ques. Is that in the middle of the track?

98 Ans. It is all the way along.

Ques. You say that there is about two or three acres in this commons here, and there is a space left in here?

Ans. Yes sir.

Ques. I will ask you if it is here or is a fact that at this point stock has been killed?

Court sustained Defendant's objection, and ruled the question incompetent.

Ques. Well, Mr. Rudd, I will get you to state whether or not at this place there was a sort of common pasturage ground for stock?

Court sustained Defendant's objection which was excepted and avowal made that the witness would state that it was a common pasturage ground for stock there; that cattle had come up there, and came there frequently, and feed there on the grass, which was very good picking for stock.

By JOHN W. LOCKETT, for Defendants:

Ques. Mr. Rudd, in speaking about the cross ties being exposed, you say the water had washed under the ties some, and some of the dirt had washed away?

Ans. Yes sir.

FRANK FIVECOATS, Witness for the Plaintiff, examined by MILLER:

Ques. Mr. Fivecoats, were you ever in the employ of the Illinois Central Railroad Company?

Ans. Yes sir.

Ques. In what capacity?

Ans. As Conductor.

99 Ques. On a Freight or Passenger train?

Ans. Freight.

Ques. How long had you been a Conductor for this road?

Ans. About 3 years, I think.

Ques. Did you ever pass this place where this accident occurred?

Ans. Yes sir, I have.

Ques. How often.

Ans. Every day.

Ques. What experience have you had in railroading?

Ans. I have had 16 years' experience.

Ques. In what capacity have you worked for the railroad?

Ans. As Fireman, Switch foreman and Conductor.

Ques. What was the condition of the track there at that point where the accident occurred between these two cattle guards?

Ans. The track was about the same there as it was any place.

Ques. Well, what was the condition of the road bed there?

Ans. Well the ties were laid on the dirt and the rails were laid on top of the ties.

Ques. Was there any fill there?

Ans. Yes, there was a little fill right south. I judge there was a little raise there of about two or three feet.

Ques. Were the ties just laid on top of that dirt?

Ans. Yes sir.

Ques. Was there any ballast of any kind, character or description between these two cattle guards?

Ans. No sir; there had been dirt packed and wedged in between the ties, and some cinders had been put there.

100 Ques. Did that amount to anything?

Ans. Not as a ballast it did not.

Ques. Was there any quantity of it there?

Ans. Not enough to do any good, in ballasting a track.

Ques. What experience did you say you have had in railroading?

Ans. I have had 16 years' experience in railroading.

Ques. Do you know how a track should be properly ballasted?

Ans. I am not a road supervisor, or section man, but I can tell pretty well when going over the track.

Ques. How should a track be properly ballasted?

Ans. It should be filled in the center in a fill; shaped like that probably in the middle two or three inches below the pilot as they call it, and then slope out gradually to the end of the ties.

Ques. How should the ballast come with reference to the rails; between these rails in the center how high ought that ballast come in reference to the top of the rails?

Ans. It should come within about two inches of the pilot in the center of the track and then slope out under the rails so that the railroad may have a good drainage.

Ques. What should be put there to make it solid?

Ans. Stone, rock, or gravel ballast should be there.

Ques. Was there any gravel ballast between these two rails?

Ans. No sir.

Ques. Was there anything to make the road bed more solid.

Ans. Some cinders were there at one time. I had unloaded some at the cattle guard, but I do not know where they were put.

Ques. Were there any cinders outside of the ties?

101 Ans. I did not notice that.

Ques. Now, then, Mr. Fivecoats, when a track is properly ballasted as you have described, how far would it be from the top of the fill to the bottom of the pilot?

Ans. About 2 inches, if your ballast is properly placed between the ties.

Ques. Is it possible for a cow or horse on a properly ballasted track with a properly constructed pilot; is it possible for an animal to go under the cow catcher?

Objected to by Defendant's Attorney. Excepted.

Ques. Can a mule derail an engine without going under the engine?

Ans. No sir.

Ques. Explain to the jury if the track is properly ballasted and

the cow catcher properly constructed, what would it do when the engine struck a cow, or mule, would it knock it off, or knock it down in front of the engine?

Ans. It would knock it off the track to one side.

Ques. Why?

Ans. Well, the pilot is sloped out this way, indicating with his hand, and when it struck an animal it would go under it and throw it off; it is — about 4 inches of the side of the — and two inches between the rail and the *pilot*, and it is so close that when it strikes anything it will go under and throw it off.

Ques. Mr. Fivecoats, you say you have been running on an engine for 16 years?

Ans. I have been running on a train 16 years.

Ques. In your experience, have you ever known, if the track and pilot is in proper shape, have you ever known a cow or
102 a mule or a like animal to derail an engine?

Defendant's Objection sustained by the Court and Plaintiff excepted. Avowal made by Plaintiff's — that the witness would answer that within that time he had not known a cow mule or like animal to derail an engine if the track and pilot was in proper shape.

Ques. I will ask you, Mr. Fivecoats; You say you passed this point every day?

Ans. Yes sir, I passed it that day.

Ques. Was cattle often on this track at this point?

Defendants object to question. Court over-rules Defendant's objection to which exception was taken by Defendant's Attorneys.

Ans. Yes, I have very often seen cattle on the track here.

Ques. How much of the ground; in this place here how much open ground was there here?

Ans. I do not know just how much there is there; it is probably 200 feet on the east side of the right-of-way, and about 1½ or 2 acres, I should guess, right along on this side of the track, the west side.

Ques. When cattle come up here on this commons, is there any way for them to get out except the way they come in; did you notice that?

Ans. No, sir, there was none that I could see.

Ques. There was no way then for them to get out unless they crossed the railroad unless they went back the same way they come?

Ans. No sir.

Ques. Was there any opening in Mr. Budd's fence, or a gate on the other side of the track; on the left side as you go to Princeton?

103 Ans. Well, the road coming up this way crossed the track, and I never noticed whether there was a road on this side or not. I did not pay particular attention to that.

Ques. This is the road is it and it crossed the track here?

Ans. Yes sir.

Ques. Well, right along here, there is a gate here is there not, right opposite Mr. Rudd's house?

Ans. Yes sir.

Ques. Was there any other way for the cattle to go out of here except to go down the road?

Ans. No sir, none that I could see.

Ques. Now, Mr. Fivecoats, you say you frequently saw cattle there?

Ans. Yes sir, it was a frequent occurrence to stop along there and let cattle get off the track.

Ques. How often did this occur?

Ans. I never noticed there more than any place else. We have had to stop in different places all along to let cattle get off the track.

Ques. You say you have seen cattle there frequently?

Ans. Yes sir.

Ques. How long after this accident occurred was it when you went down there?

Ans. I left Henderson about two o'clock that morning on the wrecker.

Ques. How long after the wreck occurred before you were down there?

Ans. I do not know just when the accident occurred. I was called about one o'clock to go down on the wrecker, and I think it was about 5:15 when I got to the wreck.

Ques. Now, Mr. Fivecoats, just tell the Jury there, in your
104 own way the condition of that track at that time?

Ans. There was a part of the mule lying right on the outside of the rail in between the two ties.

Ques. How far was this mule's body from the rail?

Ans. I could not say, it was right outside; it was cut right in two.

Ques. Was this part of the mule's body that was cut lying right on the side?

Ans. Yes sir.

Ques. How was it cut?

Ans. Clean cut, right across.

Ques. Where was the other part of the mule's body; was it right there, and had it been drug down the track?

Ans. I could not say that it was.

Ques. Now, Mr. Fivecoats, from the point that this mule body was lying; the part that was lying just on the outside of the rail, was there and did you see any marks on the ties on the outside of the rail?

Ans. I noticed marks on the outside of the left hand side, and on the right side on the inside of the rail.

Ques. How far down did you notice those marks?

Ans. About a couple of lengths of rails, or something like that, from where they started.

Ques. What made these marks?

Ans. The pony trucks of the engine had made them.

Ques. Had the drivers of the engine struck these ties in there?

Ans. No sir, if they had it would have torn the ties up.

Ques. I will ask you whether or not it would have torn the track up right away?

Ans. Yes sir.

Ques. What was the condition of the ties along there, when
105 you noticed them?

Ans. Some of them were broke and some were just marked by the wheel.

Ques. What portion of them were broken?

Ans. Well, I could not say, some of them were broke in the middle and some ends were broken off.

Ques. What was the condition of these ties in there? What portion of them were sound and what portion were rotten and worthless?

Ans. I suppose about half of them were rotten and broke off, some were broke in two and the ends broke off of some of them.

Ques. What is the weight of these engine trucks?

Ans. I could not say what the weight is, I do not know.

Ques. What is on the drivers?

Ans. Well, the weight of the engine is on the drivers, the pony trucks hold up the pilot or cow catcher.

Qeus. After you get to where you say that the lead rail took the drivers off the track;

Ans. The drivers left the track when the pony trucks hit the guard rail.

Ques. From the point below where the piece of mule lay, what about that part of the track there on to where the engine lay on this side?

Ans. It was all torn up, swept clean away. Shoved right ahead of the cars.

Ques. About how far?

Ans. I suppose about three or four rail lengths; probably about 150 feet, I expect it was about 150 feet.

Ques. Right here is the culvert, you remember that?
106 Ans. Yes, sir.

Ques. That culvert is about how far across?

Ans. It is about six feet, five or six feet wide.

Ques. How many feet deep?

Ans. Probably three or four feet deep.

Ques. The engine went across this culvert did it not?

Ans. I think the engine laid about opposite this culvert.

Ques. Had some of the cars jumped this culvert entirely?

Ans. Well, it looked that way.

Ques. On the other side of this culvert where these cars were; in this wreck here, what kind of ballast did they have there?

Defendants objected to question and answer. Court over-ruled Defendants' objection, and Exception made by defendant.

Ques. On the other side of this culvert you say the track was torn up entirely?

Ans. That is my recollection.

Ques. On the South side of this culvert what kind of ballast was there?

Ans. I could not say whether there was any ballast there or not.

Ques. Where did you find this engine?

Ans. The best of my recollection is that it was right opposite where the cattle guard was, on the left hand side as you go to Princeton.

Ques. Where were these ties and rails that had once been on this place here?

Ans. Underneath of the cars. All shoved up with the cars.

Ques. What was the condition of these ties under these cars?

107 Ans. I never noticed that. The rails were all bent and ties broken and piled up in the wreck.

Ques. Did you see Mr. Sheegog?

Ans. I saw him in the afternoon.

Ques. Where was he?

Defendant objected to question and answer. Defendant's objection overruled by the Court, and Exception made by Appellant.

Ans. Sheegog was buried underneath the engine and cars, the cars were piled up on him, he was on the right hand side, and the engine was turned over on the right hand side?

Ques. Do you know where the Engineer's place is?

Ans. Yes, sir.

Ques. How far was he from that place when you found him?

Ans. He was sitting on his seat box. He had never been off his seat box.

Ques. Just state what condition you found him in?

Defendant objected to question and answer. The Court sustained Defendant's objection and Plaintiff excepted.

Ques. Well, what position did you find him in?

Ans. He was sitting on the seat box but he was turned on his side, and we had to dig under the cab to get him out.

Ques. Did you help to get him out?

Ans. Yes, sir.

Ques. When was it when you got him out?

Defendant objected to question and answer. Defendant's objection over-ruled by the Court, and Exception made by defendant.

Ques. How long were you at this wreck?

Ans. I got there at 5:15 that morning, I think it was, after I got there I pulled part of the train back to Morganfield,

108 and then we got the Fireman out first and brought him back to Morganfield. I was there at the wreck and *and* at Morganfield and on the road between Morganfield and there until 9:15 that night.

Ques. When was it that you got Sheegog out; about what time?

Ans. About 2:30 in the afternoon.

Defendant objects to question and answer. Defendant's objection over-ruled by Court. Exception made — defendant.

Ques. And when did this wreck occur?

Ans. I could not say just when it did occur; it was between mid-

night and one or two o'clock when the caller called me. I do not remember exactly, but I think it was about one when I was called.

Ques. How far was it from the rail to where the body of the mule lay; the part that was lying there?

Ans. It laid between the ties.

Ques. What distance from the ties to that mule?

Ans. It was in between the ties about ½ feet from the rail; in between the ties wedged tight.

Cross-examination.

By H. D. ALLEN, Att'y for Def'ts:

Ques. You say you were in the Employ of the Illinois Central Railroad Company for about 3 years?

Ans. Yes, sir.

Ques. You were an engineer for three years?

Ans. No, sir, none of the time as an engineer.

Ques. What position did you occupy?

Ans. I was conductor.

Ques. Are you now in the employ of the Illinois Central
109 Railroad Company?

Ans. No, sir. I was discharged at that wreck at Harding Station.

Ques. Where do you live?

Ans. Henderson, Kentucky.

Ques. What is your employment?

Ans. Raising chickens.

Ques. What was your employment just before that?

Ans. I was in the Saloon business.

Ques. You think that raising chickens is more profitable than running a Saloon?

Ans. Yes, I think so, or I would not be at it.

Ques. What experience have you had as engineer?

Ans. None whatever.

Ques. What experience have you had as a road constructor?

Ans. None whatever.

Ques. What experience have you had as a fireman?

Ans. I fired about six months.

Ques. What were you engaged in at the time of this accident?

Ans. I was a Conductor on a freight train.

Ques. Who was the engineer?

Ans. Mr. Sandifer.

Ques. You were the Conductor?

Ans. Yes, sir.

Ques. You run through there you say every day?

Ans. Yes, sir.

Ques. Did you ever examine that ground?

Ans. No, sir, I had no reason to examine it. Some time we would stop there and do a little work. The closest that I ever ex-
110 amined the track was this morning of this wreck.

Ques. Now did you see that that whole curve was in bad condition?

Ans. I did not think that it was.
Ques. You did not know that it was in bad condition?
Ans. It was not in very good condition.
Ques. When were you over this road?
Ans. I rode over the Illinois Central Railroad here this morning from Henderson.
Ques. To where this wreck occurred?
Ans. No sir.
Ques. Did not go there?
Ans. No sir.
Ques. Did not feel interested in it?
Ans. Not so much.
Ques. Did not care when this wreck occurred; did not make any complaint as to the condition of the curve?
Ans. No sir; I was no road inspector.
Ques. You say, Mr. Fivecoats, that a cow catcher ought to be about two inches from the top of the dirt?
Ans. Yes sir, it should be about two inches.
Ques. What makes you say that?
Ans. That is just about what they are generally.
Ques. You say that is what they generally are?
Ans. Yes sir.
Ques. Is the Illinois Central Railroad your only *observation as to* the track being properly ballasted?
Ans. No sir.
Ques. Have you ever been employed on any other railroad?
111 Ans. Yes sir.
Ques. And the ballast slopes down from the top of the middle to the rail?
Ans. Yes sir.
Ques. And you say, that this kind of a pilot, the stubby pilot, will not throw stock off?
Ans. I did not say anything of the kind.
Ques. I ask you, will it? If the track is properly ballasted, will it throw them off?
Ans. Yes sir, if the track were in proper shape there would be nothing to hinder them from being thrown off.
Ques. Say now that a mule is down on the track; knocked down on the track, in the condition that this track is in would it knock it off?
Ans. It would be just as liable to run over it as it would be to knock it off.
Ques. Would it not throw it off on any track?
Ans. No sir.
Ques. Now, suppose Mr. Fivecoats, that if an animal is lying on the track with its feet towards the pilot; what is to prevent that pilot from running up the legs and running over it?
Ans. Well, because, if the track was ballasted and in proper condition, there would be no room for the legs to go up under the trucks.
Ques. With the feet of that mule turned towards the engine, if it

is there in its natural state; would not the feet go under the pilot?

Ans. No, It would not if the track was ballasted there
112 would be no danger of it going under there.

Ques. Now, Mr. Fivecoats, you say you never noticed these ties particularly before you went down there? the ties in the road about here?

Ans. I never noticed them particularly, some time when I would get off there; I never noticed anything wrong with them before that.

Ques. How many cars, Mr. Fivecoats, was there standing on the track between the lead rail and the public road that were not in the wreck?

Ans. I can not say; I pulled a part of the cars back to Morganfield.

Ques. Were they not *standing* pretty close to the switch?

Ans. Yes, they extended down somewhere near the switch.

Ques. You do not know how many cars were on the track there, you did not count them?

Ans. The cars were all on the track but about six or seven; there were five I suppose, that was piled up in a pile and two off the track.

Ques. You say that you noticed that from there about where the mule was struck there were marks where the pony truck had run and that they continued down until the switch was reached?

Ans. Yes, down to the guard rail or lead rail you call it. The lead rail runs across the track to the rail on the other side.

Ques. When the trucks went off, then the other went with it; These truck wheels are to guide the engine are they not?

Ans. I believe so.

113 Ques. Where they go the drivers will follow? That is the purpose of these truck wheels?

Ans. I suppose the engine would follow. Possibly it would.

Ques. Then, in your opinion of it had not struck; your opinion is that the cause of the leaving the track there was because the truck wheel struck that lead rail?

Ans. Yes, I think that was what caused the engine to leave the track. After the pony trucks struck this gusrd rail or lead rail that caused the engine to jump the track, I suppose.

Ques. Now, you say that you do not know what the weight of a pony truck is, is it as much as a ton?

Ans. I do not know I could not say.

By A. O. STANLEY, for the Plaintiff:

Ques. If, speaking of this track being torn up; if that track had been ballasted with gravel, rock or cinders, and if there had been sound ties where the flange of the wheel struck; could it have torn that track up going at the rate of 50 miles an hour; would it have torn that track up, torn the whole business off the track if it had been properly ballasted.

Ans. I do not think it would.

Ques. Mr. Fivecoats, you were asked by Mr. Allen, if a mule could

not stick his feet towards an engine and the engine run up on him; did you ever have any experience like that?

Ans. No sir, had none whatever.

Ques. Did you ever know of a mule laying down and sticking his feet towards an engine?

114 Ans. I never heard of a case of that kind.

H. D. ALLEN, Att'y for Def'ts:

Ques. You were not an engineer?

Ans. No sir.

Ques. You never saw a cow or horse run over then?

Ans. Certainly I have.

Ques. How many have you seen knocked off?

Ans. I did not count them. I never run the engine. Our duty was to ride on the rear of the train but we would sometimes ride on the engine.

Dr. —— THOMPSON, examined by Plaintiff's Attorney, —— MILLER:

Ques. Where do you live, Dr. Thompson?

Ans. Henderson, Kentucky.

Ques. How long have you lived there?

Ans. 37 years.

Ques. Did you ever hold any official position in Henderson?

Ans. Yes sir, I was mayor of the town once.

Ques. Were you present at this place called Harding Station the day this wreck occurred?

Ans. Yes sir, I got there about 10 o'clock the morning that it occurred. I was on my way to Paducah, and the train left Henderson at 9:30 and when we got to Harding we had to transfer around the wreck, and we were there about one or one and a half hours.

Ques. Did you notice the wreck on the track?

Ans. We were all around there, we had nothing else to do.

Ques. Did you see where this mule's body was struck 50 or 60 feet below the platform?

115 Ans. Yes sir, I do not know how many feet it was below the platform. It looked to me like his body was wedged right between two ends of the cross ties, three or four inches from the rail.

Ques. How was this body cut?

Ans. It was cut very clean; half in two.

Ques. Did you see any marks on the ties along there?

Ans. Yes sir; it looked as though the wheel had jumped the track and run along on the ties. On some it was only a small mark and others it would crush the ends of them.

Ques. What portion of them were crushed and broken?

Ans. I did not particularly notice; most of them were crushed.

Ques. How far down did those marks reach?

Ans. I do not know. These ties were marked from where the marks first began to where the balance of the track was torn up entirely.

Ques. What portion of these ties were crushed and what portion was sound?

Ans. I could not say. I think most of them were crushed; some of them were broken in the center; most of them were crushed. I should say that the majority of them were rotten.

Ques. Did you notice where these marked ties ceased?

Ans. Yes sir; they ceased where the track was gone entirely, where it was totally obliterated.

Ques. About how far did that go? How far was the track totally obliterated?

Ans. Well, as just a guess, I should say about 150 feet, or
116 something like that, I do not know exactly how far.

Ques. Did you notice the culvert down here?

Ans. I noticed the cattle guard. I did not see any culvert at all.

Ques. Was there any part of the cattle guard left?

Ans. I do not remember about that cattle guard, whether it was left or not.

Ques. This engine had gone across that; where was it laying?

Ans. It was lying on the left hand side of the track going south.

Ques. Where were these ties that had formerly lain on that track, on that 150 feet?

Ans. There was none left in the track. I think most of it was in the wreck.

Ques. What was the condition of these ties that you saw in the wreck as to rottenness or soundness?

Ans. All that I saw in the wreck were rotten.

Ques. How were these ties laid on that fill? Were they ballasted on that fill?

Ans. It looked to me like they were just laid there and had sunk in the ground just a little?

Ques. Just laid on the dirt?

Ans. Yes sir.

Ques. How did the — look near the ties?

Ans. The ties looked like they had been laid on the dirt, on the top of the ground and had been mashed down by a weight. They did not look to me like they had been worked at all.

Ques. How far down did they appear to have sunk?

117 Ans. It looked to me like it had sunk in about two or three inches; I had no way of telling, just guessing at it. I am not experienced in that line.

Ques. When you got to that wreck, had they pulled back the cars to Morganfield that had been left on the track?

Ans. I do not know whether they had or not, but I do not think they had. I was more interested in the wreck than in anything.

Ques. Then you did not pay any particular attention to them?

Ans. No, sir.

Ques. You never noticed whether they had been taken away or not?

Ans. No, sir.

Ques. Were any cars standing right where the piece of mule was laying?

Ans. No, sir.

Ques. No cars there?
Ans. No, sir.

CHAS. SUMMERS, examined by Plaintiff's Attorney, —— MILLER:

Ques. Where do you live now, Mr. Summers.
Ans. I live in Illinois.
Ques. How far from here?
Ans. I suppose about 26 miles.
Ques. Did you ever live in this County?
Ans. Yes, sir.
Ques. How long since?
Ans. I left here in February.
Ques. How long have you been living in this County?
Ans. About 8 years.
Ques. Where did you live in this County?
Ans. Morganfield and Grove Center.
118 Ques. How far is Grove Center from Harding Station?
Ans. 2½ miles.
Ques. You say you have lived at Grove Center?
Ans. Yes, sir.
Ques. What were you engaged in at that time?
Ans. Teaming.
Ques. What length of time had you been engaged in teaming?
Ans. About six months, I suppose, or maybe more than that.
Ques. What had you been doing prior to that time?
Ans. I worked on the road here at Morganfield then I went down there.
Ques. Where did you work?
Ans. Here on No. 6 Section.
Ques. Does that Section cover Harding Station?
Ans. No, sir.
Ques. How long ago, since you worked there?
Ans. About two years, I guess, could not say exactly.
Ques. What opportunity did you have for observing this track before the day of the wreck?
Ans. Well, I was hauling across that crossing at the time, and I would stop sometimes to let the horses rest, and as I had once worked on a railroad I noticed the track to see if it was ballasted there towards the depot.
Ques. What was the condition of the track there at the time of the wreck?
Ans. I could not see that they had improved it at all. The ties was still rotten and the track had gone down on the lower side and in some places the mud would splash up on the ends of the
119 ties, and it showed that there had been water under the ties.
Ques. How did you know that they had not improved it?
Ans. There was the old ties still in the road.
Ques. Had they ballasted it?
Ans. No, sir. I call rock or cinders or something that way ballast; I do not call dirt ballast.
Ques. State whether or not the rotten ties had been replaced with others?

Ans. No, sir.

Ques. Do we understand you to state that when you worked there that these ties were rotten then?

Ans. Yes, sir.

Ques. Were these the same ties?

Ans. I can not say, the ties are changed from time to time.

Ques. Were you there at the wreck?

Ans. I was there the day after the wreck occurred.

Ques. Did you notice these ties to see what condition they were in as to holding the spikes.

Ans. I walked along down the railroad from the depot, and I would pick out the spikes with my fingers and found some of them loose.

Ques. What was that due to?

Ans. It was due to letting the rails spread.

Ques. Where was it you could pull them out?

Ans. Along there in different places. I do not remember exactly where.

Ques. And the result of that would be?

Ans. Let the rails spread.

Ques. What effect does spreading have on the rails?

Ans. It would cause the drivers to leave the rail.

120 Ques. State how the rail is set and whether or not they have to be a certain distance apart, and where they have to be?

Ans. I do not know exactly the number of feet they are apart; they are spiked on the cross ties and fit the flange of the wheel so that the wheel will have no chance to jump off.

Ques. What is the effect of having these spikes loose and letting the rails be loose?

Ans. The engine will jump from one side to the other and will let the rails spread.

Ques. What is the condition of the ballast in between these two rails?

Ans. There was no ballast there at all, just dirt there up to the ties.

Ques. How about the necessity in the tamping of ties?

Ans. Well, with dirt you could not tamp them at all, it would work out as fast as you could put it under.

Ques. What do you mean by tamping?

Ans. When a point works down, we raise it up and pack dirt under it, or rather gravel or rock should be used to keep the tie from settling down again, the dirt is so soft that it will work down again.

Ques. Then, Mr. Summers, tamping means to ballast or place some solid substance under the ends of the ties to keep them from settling?

Ans. Yes, sir.

Ques. What is the condition of that place there; was it inclined to be wet or dry?

121 Ans. It was always inclined to be wet. There was no fill between the two tracks, between the side track and the main track and it kept the ground soft, and the track was soft.

Ques. Was the land high or swampy there?

Ans. On the east side of the track it was high enough to drain. On the west side it was low and level.

Ques. What was the condition on the south side of the depot?

Ans. It was level and low.

Ques. Was there a fence along the line of right-of-way there?

Ans. There was a fence on the east side running up to where the road crosses the railroad. And on the west side there was no fence for the length of that switch in there.

Ques. How long, Mr. Summers, did you work on the railroad altogether as section man?

Ans. I never worked over a year in all in this state. I worked in Tennessee about five or six years.

Ques. Do you think you know when a track is in proper condition?

Ans. Yes sir.

Ques. State what was the general condition of that track from the road crossing to the Cattle guard at the time of the wreck? When had you noticed it?

Ans. Along about the 1st of May.

Ques. If the wreck was the 7th then this examination of yours was between the first and the 7th?

Ans. Somewhere near there.

Ques. Now, Mr. Summers, if I understand you, you say that that track was in bad condition from the depot on down?

122 Ans. As far as I noticed it to where the rock ballast commenced.

Ques. Where did the rock ballast commence?

Ans. Right at the lower bridge.

Ques. Right at where the wreck was?

Ans. Yes sir.

Cross-examination.

H. D. ALLEN:

Ques. How long did you reside in this state after the wreck at Harding Station?

Ans. Up until this last February, just moved away. Left here in ——.

Ques. When were you first employed by the Illinois Central Railroad Company?

Ans. I can not state exactly when.

Ques. How long before this wreck?

Ans. Employed about a year I suppose.

Ques. How long did you continue?

Ans. Up until about a year ago I guess.

Ques. Did you continue until after this wreck?

Ans. Oh, No sir, six or eight months before this wreck occurred?

Ques. How long since this wreck occurred?

Ans. Some two years this coming May.

Ques. You say that at that time you were hauling across that road; Where were you hauling from?

Ans. Yes sir; from down in the bottoms there to Grove Center.

123 Ques. Is there a right-of-way over there?

Ans. Yes sir.

Ques. And at that time it so happened that there was no obstruction there whatever?

Ans. None that I could see.

Ques. How many trips did you make across that railroad?

Ans. I do not know, we hauled about a month.

Ques. You say you would see the track as you passed?

Ans. Some time I would stop the horses there to rest, just beyond the crossing 20 or 30 yards and some time we would go up to the depot and eat our dinner, and in walking to and from the depot I noticed the track and ties.

Ques. Was there any one hauling with you?

Ans. Yes sir, John White was with me.

Ques. Where is John White?

Ans. I do not know.

Ques. Who else was with you?

Ans. Elisha Morris.

Ques. Who else?

Ans. That is about all I can think of now, there is one more, but I can not think of the name.

Ques. You say you would look at the track?

Ans. Yes sir.

Ques. What would induce you to go down and look at the track?

Ans. Well, because I had worked on the track and I would go down to see if they had improved it any.

Ques. Had you no other reason?

Ans. No sir.

Ques. Did you look north or south?

124 Ans. Just south.

Ques. Why did you not look north?

Ans. Because there was no shade up there and nothing to draw us up that way?

Ques. Where did you leave your teams?

Ans. We come right up the side of the track above the depot and about 20 or 30 yards from the crossing stopped to rest our horses, then we would get off and go up to the crossing and walk down the track to the depot.

Ques. Why did you not go over the north side?

Ans. Because we could not stop our horses there, there was no shade to draw us that way.

Ques. Just in walking over this from the crossing to the depot, that was the only occasion there was to notice it?

Ans. Yes sir.

Ques. About how long before the accident occurred?

Ans. I commenced to haul about the 1st of March.

Ques. You were there the day of the wreck?

Ans. No sir, I was there the day after the wreck.

Ques. When did you first speak of this condition to any one, Mr. Summers?

Ans. I do not know; some time ago.

Ques. Some time ago?

Ans. Yes sir.

Ques. You say that the ties were entirely all rotten?

Ans. A good many of taem were, I did not count them.

Ques. Were they in that condition when you worked on that road?

Ans. Yes sir.

125 Ques. Why did you not remove them?

Ans. Because it was not my business, I worked under a foreman.

Ques. Who else was he working with you there?

Ans. I could not say, I do not reme-ber exactly.

Ques. Was the railroad bed solid; you say it was mushy?

Ans. I do not remember. It had dried out considerably, but was pretty low.

Ques. You say the trains run over it there?

Ans. Yes, and I have noticed the shaking and wabbling of the train where the water would wash under the ties, right along at the public road crossing.

Ques. About the crossing, you say that you noticed there that you could pick out some of these spikes with the hand at the time?

Ans. Yes sir.

Ques. Now, if I understand right, the car wheels have a flange on the inside, I believe; and if there was any spreading of the rail, would not the flange come down between the rails?

Ans. Yes sir.

Ques. So in such condition, you think that the rails would spread and thereby cause an accident?

Ans. I suppose so, yes sir. But I do not think that it would cause a wreck.

Ques. Well, it may cause an accident?

Ans. Yes sir, it has done such as that.

Ques. Now, then, if you let these engine wheels down inside of the rails and run along, would not the engine press these rails out?

Ans. Yes sir.

Ques. In that case would not these rails be torn up?

126 Ans. ——

—— MILLER:

Ques. Mr. Allen asked you a while ago, about Mr. —— and why you did not take those rotten ties out, if you knew they were rotten; I will get you to state whether or not you heard Mr. Brannon, Section foreman, complain to the road master and ask him in your presence for material to improve that track?

Defendants objected to question and answer. Defendants' objection over-ruled by the Court, and Exception made by Defendants.

Ans. Well, I heard Mr. Brannon ask for both ballast and ties to put in that track. I heard him ask Mr. McNamara for the material.

Ques. Who was he?
Ans. The Road Supervisor.
Ques. Did he get it?
Ans. No sir, not while I was there.
Ques. Was there any stone ballast or slack ballast put along there at all?
Ans. No sir. None at all. They unloaded some slack there to put in between the track.
Ques. I will ask you whether or not when this complaint was made by Mike *Brannon*, the Section Foreman, were you having any trouble in keeping the track in alignment at that point?

Defendant objected to question and answer. Objection of Defendant over-ruled by the Court and Exception made by Defendant.

Ans. Yes, they were having trouble.
Ques. What did they have to do to get it into alignment?

Defendant objected to question and answer. Objection of Defendant over-ruled by the Court and Defendant excepted.

127 Ans. In hot weather they would have to throw more curve into the track of course, to get it into line. In wet weather the track would slip and get it out of line.

By H. D. ALLEN, for Defendant:

Ques. Mr. Summers, you say that in hot weather they had to do that to keep the curve in proper condition; that the rails would expand and that you had to go there and draw the rails in line; you say you had to change the curve every time the weather changed?
Ans. No, I did not say that; I said we had to very often.
Ques. How often?
Ans. Well, every time the track would get out of line. I do not know how often that was.
Ques. How could you hold the expansion of iron to its place?
Ans. Easy enough. If you ballasted the track you could keep the ties from sliding out.
Ques. You say you spiked the ties down tight over the rails.
Ans. Yes sir, as tight as we could.
Ques. What would happen to the ties if the rails expanded?
Ans. The rails would buck in the middle and bend to one side, and the ties would slip.
Ques. Was that what was the matter with this road here?
Ans. It was in hot weather.
Ques. In cold weather it would be better?
Ans. In cold weather it would slide out.
Ques. Why?
Ans. Because the train in running there over it would make it work up and down.
Ques. Where was Mr. McNamara when you heard Mr. Brannon tell him?
128 Ans. I cannot say as to the exact point.
Ques. What was Mr. McNamara doing?
Ans. He was Supervisor of the track.

Ques. What was it he said to him?
Ans. He called for ballast and ties to fix that track.
Ques. What did he say to him?
Ans. I do not exactly know what he said, I know he called for enough to fix the place.
Ques. What place did he want to fix?
Ans. It was for Harding Switch.
Ques. What part of it?
Ans. The whole switch. He wanted ballast to fix the whole switch, the whole length of that switch.
Ques. Ballast on each side north and south?
Ans. Yes.
Ques. He wanted to ballast the main track the length of the switch?
Ans. Yes, he wanted to ballast the main track the length of the whole switch.
Ques. How long after that had you examined there thoroughly?
Ans. Not over a month.
Ques. Now, then, you were away from there how long?
Ans. I stayed here in Morganfield about six months and went to Illinois last February.

Mr. JOSEPH O'BRIEN introduced for plaintiff.

By —— MILLER, Att'y for Plaintiff:

Ques. Give us your name?
Ans. Joseph O'Brien.
Ques. Where do you live?
129 Ans. Grove Center.
Ques. What is your business.
Ans. I am working at the stave Mill.
Ques. What was your employment on May 7th, 1903.
Ans. Railroading.
Ques. In what capacity, what kind of work were you at?
Ans. Section work.
Ques. On what section.
Ans. Section No. 7.
Ques. State whether Section No. 7 embraces Harding Section in Union County?
Ans. Yes sir, passes right along by Harding Depot there.
Ques. How long had you been working upon section No. 7 as a Section hand prior to May 7th, 1903.
Ans. I do not remember exactly. I worked on there several different times for about a year.
Ques. Had you been employed on that Section for as much as a month before the wreck?
Ans. Yes sir.
Ques. About how long before the wreck?
Ans. About three months.
Ques. Did you continue as a section man after the wreck on that Section and if so for how long?
Ans. Yes, sir, for three weeks after the wreck.

Ques. Then you were at work on that Section at the time of the wreck?

Ans. Yes sir.

Ques. Mr. O'Brien, it is in proof here that here is Mr. Moss Rudd's barn, this is Harding Station; now what is over the little de-
130 pression beyond the switch at the north side of this and on the other side of this switch? Are there cattle guards on either side?

Ans. Yes sir, one over on the north side of the switch and one on the south.

Ques. About how far; what distance is it from the cattle guard on the north to the cattle guard on the south?

Ans. Oh, I have no idea how far it is.

Ques. About how far, in your best judgment?

Ans. About 300 yards, I suppose.

Ques. Describe to the Jury there in your own way the condition of that road bed at that point along there?

Ans. There was no ballast there and the ties were not real good.

Ques. Were there rotten ties?

Ans. They were not real bad, some were rotten, there was some rotten ties in among them.

Ques. No ballast there?

Ans. No sir.

Ques. Mr. O'Brien, what kind of soil was that there?

Ans. It was a kind of clay.

Ques. At that point there?

Ans. Yes sir.

Ques. Kind of clay?

Ans. Yes sir.

Ques. State whether or not there was any trouble in keeping the track in alignment at that time?

Ans. Yes sir.

Ques. Before May 7th, about that time and at that time
131 you say there was?

Ans. Yes, sir.

Ques. What were you doing to get the track in alignment; would it get out of alignment often?

Ans. Yes, sir.

Ques. What would you do to get it back in alignment?

Ans. We would take out alignment bars, and sometimes we would take jacks to jack it into line, we would set one on one side and put it back into line.

Ques. Explain what you mean by getting out of alignment?

Ans. Well, the track would slip out; the ties would slip.

Ques. What effect would that have on the iron rails?

Ans. They would be bound to slip.

Ques. By jacking them back, what do you mean?

Ans. We would take them on each side and jerk them back into place.

Ques. How many times did you have to jack them back into place?

Ans. Sometimes three or four places in a week.

Ques. Were you required to do any flagging of trains there on account of that wreck?

Ans. Only during the wreck.

Ques. You say there was no ballast there?

Ans. No, sir.

Ques. State the condition of the ties as to being tamped?

Ans. On the higher side they were some better, while on the lower side it was sunk down.

Ques. If the road had had rock ballast there where you stated that as often as three times a week you would have to jack
132 the track back into place; if good sound ties had been there and had they been spiked to the rails and rock ballast and rock tamping put under the end of the ties, do you think that it would have been necessary to jack them back into place?

Defendant objected to question and answer. Objection overruled by Court, and Exception made by defendant.

Ans. No, sir, I do not think so.

Ques. What was it that made it necessary for these alignments three or four times a week?

Ans. Why, the wet weather made it soft in there and it would slip.

Ques. How did you prevent that?

Ans. Well, you have got to have a ballast under there to hold them to their place.

Ques. What effect does tamping have?

Ans. It has a good effect, it will hold the ties to their right place.

Ques. If I understand, the tamping of the track under the ends of the ties is to keep the ties from rocking back and forth?

Ans. Yes, sir.

Ques. Mr. O'Brien, State to the Jury there, whether in your judgment as a section man and observing a road and the building of track; whether the track was in a good condition at that point?

Defendant objected to question and answer. Objection overruled by Court to which Defendant excepted.

Ans. No, sir, it was not.

Ques. Well, I will get you to state as to whether that
133 track at that point was not in a more unsafe condition; in a worse condition than it was in any other place?

Objection of Defendant's Attorney sustained by Court to which Plaintiff excepted.

Ques. What was the condition of the spikes that hold the rails in place there?

Ans. A great many of them were not secure.

Ques. Why not?

Ans. Because of the rotten ties.

Ques. Then if the ties are rotten and the spikes slip and render them uneven what effect does that have?

Ans. It makes the track——

Ques. Does that render the track unsafe and insecure?

Defendant objected to question and answer. Defendant's objection over-ruled by Court, and Exception made by Defendant.

Ans. Yes, sir.

Ques. Was this track in any improved condition, better condition at that time than it was when you first began to work on it?

Objected to by Defendant's Attorney and question with-drawn.

Ques. How long have you been working, have you worked all together as a Section man?

Ans. About 8 months.

Ques. Did you work on any other section?

Ans. On No. 8 about 18 months.

Ques. Do you think you know when a track is in proper condition?

Ans. Yes, sir.

Ques. At this point how much of the ties were exposed in the center?

134 Ans. Not a great deal; not in the center.

Ques. How were the ends exposed?

Ans. Up on the side of the track they were washed out a right smart.

Ques. What effect did the rains have upon the track there?

Ans. Right smart; it had washed the dirt from under the ends of the ties, and in low places it would run under the ties and when the train went over it it would spew up by the side of the ties, causing a kind of mushy place.

Ques. That condition had existed there just prior to this wreck?

Ans. Yes, sir.

Ques. Were you there after the wreck?

Ans. Yes, sir. I worked about two or three weeks after the wreck.

Ques. What time did you get there after the wreck?

Ans. About 4 o'clock.

Ques. Did you see this mule or any part of it there?

Ans. Yes, sir.

Ques. What was the condition of the track just before you got to that bridge down there; this side of the south bridge?

Ans. It was torn up.

Ques. Where was the engine, on which side of the road did it go off on?

Ans. On the left, going south.

Ques. Did you notice the condition of it, which way it was heading?

Ans. Yes, sir, it headed out kinder in this shape; it lay out to one side.

135 Cross-examination.

By JOHN W. LOCKETT, Att'y for Defendant:

Ques. You worked on the section there for what length of time?

Ans. About a year at different times off and on.

Ques. How long before this wreck had you quit working there?

Ans. I never quit until two weeks after the wreck.
Ques. How long after the wreck did you work?
Ans. Two weeks.
Ques. What did you quit for?
Ans. Quit on my own accord, got tired of working on the railroad.
Ques. Who did you work under?
Ans. Tom Marrs.
Ques. You spoke of some trouble in keeping the road in proper alignment.
Ans. Yes, sir.
Ques. You say — to use a jack to put in into place?
Ans. Yes, sir, several times.
Ques. And what you mean is that the ties slipped out of line, and then would have — put them back so as to keep the line straight?
Ans. Yes sir.
Ques. Was not that work done north, which is this side of the cattle guard, this way?
Ans. That was this side of Harding Station and then there was a point right down at the depot which was hard to keep in.
Ques. And beyond that was there any?
Ans. The track lay upon an embankment between 1 and
136 2 feet in height and we did not have any trouble in alignment on that.
Ques. Did you have any trouble from one switch to the other? There are two switches there are there not?
Ans. Two switches there, from the side track to the other.
Ques. Did you have any trouble in the alignment beyond the platform going South?
Ans. It was not so bad there.
Ques. Did you ever have any trouble there?
Ans. No, not a great deal.
Ques. Did you ever have any?
Ans. Yes, sir, we had some.
Ques. When did you have it?
Ans. At two or three different times.
Ques. When?
Ans. I could not tell you that.
Ques. Was it a year before that?
Ans. No, sir.
Ques. About six months before? That would take it to November, 1902, six months before the time?
Ans. During the year as near as I can come to it.
Ques. You say you were there after the wreck that same day?
Ans. I was there at the wreck that same morning.
Ques. Mr. O'Brien, you spoke of the condition of the ties being such that there was danger of the rails expanding, and that made it unsafe, I believe you said?
Ans. Yes, sir.
Ques. And I believe you said that if the rails expanded that the wheels would drop down outside of the rails?

137 Ans. Yes sir.

Ques. How could the wheels get on the outside of the rails when it spread?

Ans. It could not do that.

Ques. The wheels on neither side of the engine could get on the outside of the rail, they would just simply force the rails to one side if they should spread, would they not?

Ans. Yes sir.

Ques. Would that tear the track up?

Ans. Yes sir.

Ques. Is that the only unsafe condition that you observed?

Ans. No sir, on the lower side of the track in wet weather was in lots of places bad, the ties would work up and down and the water made it a kind of slush, and it slushed up on the ties. The ties would work up and down.

Ques. Where were those places that you saw in this condition?

Ans. Well, it was all along there. In different places.

Ques. Was it near where the mule was struck?

Ans. No sir, not exactly in the same place.

Ques. Near the place?

Ans. Yes sir.

Ques. It was nearer to the public road was it not?

Ans. Yes sir.

Ques. Mr. O'Brien, you said in the outset that there was no ballast between the ties?

Ans. There was a little right in the center of the ties put on the upper side of the track.

Ques. Was any dirt there?

Ans. Yes sir. There was some there.

Ques. Was any ballast there?

Ans. No sir.

138 Ques. Do you regard dirt as ballast?

Ans. No sir.

Ques. Dirt is no ballast at all?

Ans. No sir.

Ques. When you said that the track was not ballasted at that point, was not rock and gravel at that point?

Ans. No sir.

Ques. Near this point, you say it was not ballasted?

Ans. No sir. The dirt between the cross ties in the center of the track was about the top of the cross ties, about on a level.

Ques. And that was from the Station to the cattle guard on the South?

Ans. Yes sir.

Ques. In the center?

Ans. Yes sir.

Ques. And sloped off between the rails on either side?

Ans. Yes sir. It was a gradual slope on the upper side, and on the lower side it was washed out, and in some places was sloshy, and muddy.

Ques. On the upper side you say it was level along with the ties?

Ans. Yes something like a level.
Ques. What time of the day did you say you got to that wreck?
Ans. About 4 o'clock in the morning.
Ques. And the engine had its head pointed towards the East.
Ans. Kind of South East.
Ques. It did not then turn clear around?
Ans. No sir.
Ques. Was there any cars on the track when you got there? Was there any cars on the track standing between the part where
139 the mule was struck; where the mule was cut in two, north of where the mule was cut in two?
Ans. Yes sir.
Ques. Was there any cars standing on the track south of *the* where the mule was cut in two?
Ans. No sir.
Ques. It was four o'clock when you got there?
Ans. Yes sir.
Ques. You were not there any other hour of the day before four o'clock.
Ans. No sir, I got there about 4 o'clock.
Ques. Where are you living now, Mr. O'Brien?
Ans. At Grove Center.
Ques. You are now engaged in teaming? What is your business?
Ans. I work for the stave Mill.

Mr. L. T. LENEAVE, Introduced for the Plaintiff.

By J. G. MILLER, Att'y for Plaintiff:

Ques. State you name?
Ans. L. T. Leneave.
Ques. Where do you live, Mr. Leneave?
Ans. I live adjoining farms to the Harding Farm that belongs to the Wallers now.
Ques. How far from this wreck?
Ans. About one mile.
Ques. Were you living there at the time of the wreck?
Ans. I was.
Ques. Were you not at the wreck on the morning it occurred?
Ans. I was.
Ques. About how long after it occurred? About what time of day was it when you arrived there?
Ans. About five o'clock in the morning.
Ques. What did you see there?
140 Ans. I saw there was a terrible wreck there.
Ques. Well, Mr. Leneave, describe it as best you can to the Jury?
Ans. Well, I found that there was a railroad wreck there. There was some cars standing on the track. The train consisted of about 15 or 17 cars the best of my recollection. Right opposite the station where the cars were standing on the track; the Caboose was right back here in front of the depot. A part of the cars remained on the

track, and the balance was piled up on both sides of the track and just below the station some three or four lengths of the rail the ties were marked, along there from where the mule stood or lay or at least it was a mule, and from the place we supposed the mule was at the time the train struck it it did not go off but went out a little until it left the track going south, and the first mark on the ties was about 12 or 15 feet from where we supposed the mule was cut in two, and there half of the mule was lying on the left, right along by the side of the ties, and there from the very first time that the track, supposed to be the track, of the wheel struck the first time, you could see the marks; of course it struck it right as it jumped off as it progressed down south, from there on it got wider and wider until it went off about 200 or 150 yards from where the mule was struck until the track was obliterated; all swept into this bridge; it was no cattle guard, it was a bridge, and they used the ditch for conducting water out of the railroad bed, that is to conduct water off the sides, and run through Mr. Waller's field. This was a
141 small culvert, it was not a cattle guard, it was a small cattle guard.

Ques. How did the water drain from off the upper side of the track?

Ans. Under the track; also that was the only way the water had to get out of Waller's field and on either side of the railroad track. It could not go out any place unless it would over flow and go over the ties.

Ques. And where did you say the engine went off?

Ans. It began to go off there, you could see where the water and the like of that was up against the ties where it had mashed down and scarred and dried; when it got down there at that place, I suppose it struck this guard rail that I have heard so much talked of, then it just swept everything clear into this little culvert and cleaned it all up. The majority of it there was broken ties and the like of that. The ties there from the station down was not ballasted like it was farther on; there is no question about that, they seemed to be just laid down there. That is how it is.

Ques. Now, then, Mr. Leneave, I understand you said that from the time this little wheel seemed to get off the track that the mark went further and further towards the ends of the ties until it finally went off?

Ans. Yes sir.

Ques. Beyond that place about where the train went off which way did the train go; part on one side and part on the other or how?

Ans. It had simply pressed on right forward going south.

Ques. On the right or the left?

—. ——.

142 Ques. The engine was on which side?

Ans. On the left.

Ques. And most of the cars went on the right?

Ans. Yes sir.

Ques. Did not some of them go on the left?

Ans. Yes sir, Oh, yes sir.

Ques. I will ask you, Mr. Leneve, whether or not that engine went off just about the time it got to that place where the track was ballasted?

Ans. It went off just beyond where it was ballasted?

Quez. I will ask you whether or not it was ballasted on the south side below that depot?

Ans. Well, I think it was.

Ques. Where were the rails off the track?

Ans. Under the cars probably. It was such a mush.

Ques. When the wheels went off did the track seem to keep together?

Ans. It all went to pieces, right abruptly so; like that; the track here in-tact, and all below, gone. Clean swept.

Ques. Had the rails gone to the right or to the left of the track?

Ans. On the right.

Ques. And you say that the engine was on the left?

Ans. Yes sir.

Ques. Did you notice that track between the depot and that culvert to the wreck?

Ans. Yes sir.

Q. Well, describe it to the Jury, describe its condition as to the condition of the ties and the road bed?

Ans. I think it was mighty bad, sure. The ties were in a
143 very bad state.

Ques. Why were they in such a bad shape?

Ans. Because they were broken in the middle by the weight of these trucks on the end?

Ques. Broken in the middle, were they rotten?

Ans. Yes sir.

Ques. What portion of them were rotten?

Ans. Now, I am not able to say that, I never counted them, but a great majority of the ties were rotten.

Ques. You have no interest in this suit?

Ans. No sir, none in the world sir.

Ques. Are you in any way related to Mr. Sheegog, or any one connected with this case?

Ans. No sir, not at all.

Ques. How did you first hear of there being a wreck there at that place?

Ans. Mr. Rudd telephoned to me to come over there, and told me that there had been a wreck.

Ques. You spoke of seeing the condition of this track before the wreck?

Ans. Yes sir, I am often over there, I sell my stuff and when I sell it I deliver it there, my wheat and corn. I often go there.

Ques. In delivering your wheat or any stuff, or in unloading a car the cars would then stand out along by the side of this track where the wreck occurred?

Ans. Yes sir.

Ques. How long did you say you had been acquainted with — track, Mr. Leneave?

Ans. Ever since it was built. I have lived where I live
144 now ever since.

Ques. Now, Mr. Leneave, supposing this to be the depot here and this to be the crossing here, and this to be the culvert here where the wreck occurred; about where was your house?

Ans. Northwest of there about one mile.

Ques. Then the road crosses up here that goes South? Does that line about represent the fence as it runs along the right-of-way?

Ans. Yes sir.

Ques. Is there any occasion here of closing all of the right-of-way?

Ans. No sir, not there. (Point indicated on map.)

Ques. This is a fence there on that side coming up to here?

Ans. Yes sir.

Ques. Did you notice anything about the mule's tracks?

Ans. Yes sir. I noticed the tracks of the mule. I did not pay any particular attention to them. I rather think that they pointed south as if he — going down the track.

Ques. You say that this right-of-way is fenced from there on on each side?

Ans. Yes sir.

Ques. This is the public crossing, is it not?

Ans. Yes, sir, Oh, yes sir, that is the public road, this portion of the road is worked by the County and known as the Steve Anderson road; and here is the Lower Caseyville road *road* leading into there, I do not think this road is worked by the county, it is just a neighborhood road.

Ques. Is this the only road that comes to the Depot from
145 the Caseyville road?

Ans. Yes sir.

Cross-examination.

By H. D. Allen, Att'y for Defendants:

Ques. Mr. Leneave, I understood you to say -while ago that just about the bridge, what you call the bridge, and what some of them spoke of as a cattle guard which is the same, beyond to where the wreckage was piled everything is torn all to pieces. Beyond from here, south to that?

Ans. Where the train left the track it was.

Ques. Was any of the switch torn up?

Ans. Yes at the south end of the switch, the train left the track there quite a distance above there.

Ques. About how far?

Ans. Oh, I should say that it was about half way from the Station down to this bridge, it seemed to stay on this track until it struck this guard or lead rail, and the main wreckage was after that.

Ques. You say the main wreckage was after the trucks struck the lead rail?

Ans. Yes sir, and then carried it all right straight along.

Ques. You say up to that time that the road was in-tact?

Ans. Yes, up to the lead rail of the switch, somewhere about there?

Dr. THOMPSON re-called.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. We omitted to ask you, yesterday, Dr. Thompson, if *if* you noticed whether these cross ties were regular as to the distance apart or otherwise. State to the Jury the conditions where the mule
146 was struck, where it was lying and where the engine jumped the track and down to where the wreckage was, that is, where the track was torn entirely away?

Ans. They were very irregular.

Ques. About what distance apart?

Ans. There was no certain or definite distance between the ties; some were rather close together and some rather far apart.

Ques. How far apart in your best judgment?

Ans. I should think some was as much as 20 inches apart, I could not say positively, as I did not measure them.

Ques. Where was this mule?

Ans. He was just on the left hand side of the track, close up by the ties.

Ques. Was he between two of these ties?

Ans. Yes, he looked like he was wedged between two ties, mashed down between them.

Ques. Was the entire half of the mule wedged between two ties on the East side of the track?

Ans. A part of the mule was wedged between two ties.

Ques. How much was it?

Ans. I did not look close enough for that, a part of the mule was rather close on the East side of the track wedged in between two ties, and the ties were closer on the west side of the track than they were where the mule was laying.

Ques. On which side were the ties closest together at that place?

Ans. On the right hand side of the two ends of the ties were close together, and in some places they were rather far apart.

Ques. How close were they together where the mule was?
147 Ans. I should say about 20 or 22 inches.

Ques. How far apart on the right hand side?

Ans. I am rather a bad judge of distances but I should say it was something like 8 or 10 inches.

Ques. Dr. Thompson, did you say that they had slipped?

Ans. I did not look at that.

Ques. You did not see any evidence where they ha[illegible]een misplaced?

Ans. I did not examine.

Ques. Did you not see where the tie had moved out of place?

Ans. I did not examine, I simply looked over it for curiosity; it looked like a mule had been mashed between them there in one place I could not tell, I did not pay particular attention to it.

Ques. Were there any cars standing at that point?

Ans. I do not remember, I did not notice.

Ques. You are not related to Mr. Sheegog, are you Dr. Thompson?

Ans. No sir.

Ques. You were making a business trip?

Ans. Yes sir.

Ques. Dr. You spoke of the places where the mule was left there, you say that the marks that began there was the marks of the pony trucks?

Ans. I suppose they were.

JAMES LENEAVE. Introduced for Plaintiff.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. State your name?

Ans. James Leneave.

148 Ques. Where do you live?

Ans. Near Harding Station.

Ques. Are you a son of L. T. Leneve?

Ans. Yes sir.

Ques. What is your age?

Ans. 24.

Ques. How far did you live from Harding Station at the time and prior to this wreck of May 7th, 1903?

Ans. About ½ mile, something over ½ mile.

Ques. State to the Jury there, whether you ever had occasion to be at Harding Station?

Ans. Yes sir; in hauling and delivering corn there, and in travelling on the train we had to get off and on the train there.

Ques. Did you take the train at Harding Station?

Ans. Yes sir.

Ques. State to the Jury there, if you noticed the condition of the track and the railroad bed below and in front of the station and above it; between the two cattle guards just prior to this wreck. Did you notice the condition?

Ans. Yes sir.

Ques. Describe the condition as to the ties, how they were laid and all about it?

Ans. The ties were laid very irregular on the road bed and just laid on the top of the dirt, and there was no dirt, rock, or gravel on top of the ties or ballast?

Ques. No Ballast?

Ans. No sir.

Ques. State the condition of these ties as to soundness?

Ans. They were not good ties, they were rotten. Some of them rotten.

149 Ques. Mr. Leneve, state the condition of the road bed there as to the ends of the ties extending from the rails as to tamping?

Ans. There was no dirt at the end of the ties, that is at the extreme end, but between the ties from the rails, there was dirt along in the center.

Ques. State if you ever noticed trains passing there and if so what effect they have had on the track?

Ans. Yes sir, I have noticed trains passing over here, passenger

trains passing up and down, and the water had made it so wet that it would squ-sh up between the ties and the track would seem to go up and down, it would sink down and then rise again after the train had passed on.

Ques. You say the water had washed from under it?

Ans. Yes sir, out on the end.

Ques. You say the ties were loose?

Ans. Yes sir, there was no dirt against the ties.

Ques. Was there any space between the ties and the dirt?

Ans. Yes, sir, there was a space in some places.

Ques. Was that not between the ties?

Ans. Yes sir.

Ques. How much space?

Ans. I would think about 1½ or 2 inches.

Ques. The top of the space was larger then than at the bottom?

Ans. Yes sir.

Ques. You say, then that in the center of the track that the rails would squ-sh them up and down and that it worked the dirt away from the ties and left a space there?

150 Ans. Yes sir, and you could get your hand in between the dirt and the ties.

Ques. How much space?

Ans. There was a space in the middle; just about 1 or 1½ or 2 inches.

Ques. Then there was not dirt on the top of the ties?

Ans. No sir.

Ques. What effect would the ties sinking there have on—I will ask if you have ever noticed mud sloshing up and the ties churning?

Ans. When the cars would pass over it they would rock and sway and the muddy slush would slosh up on the ties.

Ques. You are not related to Mr. Sheegog, are you?

Ans. No sir.

Ques. And did not know him?

Ans. No sir.

Ques. Was there any ballast on that track?

Ans. No sir.

Ques. How far did that condition you spoke of extend?

Ans. Between the two cattle guards and along in front of the station.

Ques. Was it between the cattle guard on the south where the wreck occurred and the cattle guard on the north; was that where the rocking and swaying was?

Ans. Yes sir.

Cross-examination.

By H. D. ALLEN, Att'y for Defendants:

Ques. Mr. Leneve, when did you first notice that?

Ans. When I first noticed it it was in the early spring of 1903.

151 Ques. You mean along towards the first of March?

Ans. Yes sir, in the early spring.

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Ques. About the 1st of March?
Ans. I could not say for certain. It was in the early spring.
Ques. What were you doing at the time?
Ans. Different things, sometimes nothing, just walking about? I have gone down there often through the week and on Sunday.
Ques. About how often did you see the track?
Ans. Well, about two or three times a week.
Ques. Now, Mr. Leneve, you say that some of the ties were rotten?
Ans. Yes sir.
Ques. How did you notice that?
Ans. Just by walking over the track.
Ques. You say you walked down the track and noticed the ties were rotten?
Ans. Yes sir.
Ques. What part were rotten?
Ans. All of them were rotten.
Ques. All of the ties were rotten?
Ans. No sir, not all the ties were rotten; all of the tie was rotten; it was not gone all together, not gone away.
Ques. It was considerably rotted?
Ans. Yes sir.
Ques. Where did you notice it, between the ends of the ties or beneath the ties?
Ans. It was a gradual decay all along it.
152 Ques. About how many did you notice in that condition?
Ans. Well, I would say 2/5 of them.
Ques. Mr. Leneve, you say that a mule was struck.
Ans. Yes, sir.
Ques. Did you know that mule?
Ans. Yes, sir.
Ques. How tall was he?
Ans. About 15 hands high.
Ques. Was he not 16 hands high?
Ans. No, sir. That was my judgment.
Ques. Did you ever see where the mule was struck?
Ans. Yes, sir.
Ques. About how far was that from the Depot? About, say, from the front of the Depot?
Ans. It was about 30 yards from the crossing.
Ques. Where did you first notice rotten ties? Did you notice any between the road and where the mule was struck?
Ans. Yes, sir.
Ques. Then did you notice some beyond between where the mule was struck and the cattle guard where all the track was swept away?
Ans. All along.
Ques. About how may ties in your opinion are there between where the mule was struck and the switch; where the track all went off?
Ans. Well, I do not know exactly.
Ques. You saw the wreck. About how many?
Ans. I should think 125 or 150; that is my opinion.

Ques. That would be your judgment?
153 Ans. Yes, sir.
Ques. How far is it down there? 60 yards?
Ans. It is about 25 or 35 yards.
Ques. Then in that distance you say there were 150 or 160 ties?
Ans. I did not say 160, I said 125.
Ques. How wide are these ties on the top?
Ans. In my judgment about 8 inches.
Ques. Were the ties regularly laid?
Ans. No, sir.
Ques. What was the matter with them?
Ans. They were very irregular.
Ques. How?
Ans. Some laid closer together than others.
Ques. What would be the difference, was it as much as two inches?
Ans. Most of them some 4 and 5 inches.
Ques. You did not see any difference in the track there as to alignment, did you?
Ans. No sir.
Ques. Mr. Leneve, you say now that it was sloshy?
Ans. Yes sir, in some places.
Ques. Is it not a fact that there is a rise in that road going south from where the mule was struck, from that depot?
Ans. Yes, there is a little fill.
Ques. Does the water go around that and drain through the culvert?
Ans. No sir, it is a fill below the depot, but it is almost level, barely slanted on the left hand side as you go south.
154 Ques. And the water runs down that side along the foot of the embankment and runs t-rough this Culvert?
Ans. I do not know about that.
Ques. Was that road bed on that side muddy?
Ans. No sir.
Ques. You say it is 2 feet or 18 inches high; does water stay on that embankment so as to slush up and down?
Ans. I noticed that it was muddy.
Ques. Was it muddy all along on that side?
Ans. Yes all along.
Ques. All the ties in that condition?
Ans. I did not mean to say that all of them were in that condition.
Ques. What part was muddy and what part was not?
Ans. All, generally speaking.
Ques. Mr. Leneve, did you say you noticed the road bed near the depot?
Ans. Yes sir.
Ques. Was that muddy too?
Ans. Yes sir.
Ques. The whole thing from one end of the switch to the other?
Ans. No- all the ties, what I mean in places it was muddy, the muddy slosh would work up on the ties.

Ques. Was one end of the track muddier than the other, including the Switch?

Ans. I do not know about that.

Ques. You say you saw it at the time of the wreck?

Ans. Yes sir.

155 Ques. You saw where the mule was struck?

Ans. Yes sir.

Ques. How long just before the wreck since you had seen that road where the wreck occurred?

Ans. I can not say for sure, maybe 5 or 5 days.

Ques. I will ask you then if the road was not dry on the 7th day of May, 1903?

Ans. I could not say.

Ques. You do not know the condition of the road bed then?

Ans. No sir.

Ques. You do not know?

Ans. I could not say for certain what condition it was in right at that time.

Ques. From the early spring along up to that time; was it muddy when you saw it?

Ans. I could not say for certain.

Ques. Did you notice the road the day of the wreck?

Ans. No sir, not particularly.

Ques. You did not notice whether it was muddy or not?

Ans. No sir.

Ques. Did you notice any misplaced ties there?

Ans. No sir, only that they were just the same except where the wreck occurred.

Ques. I mean down between the end of the switch and where you saw pieces of the mule, was the track the same as it had been before?

Ans. Yes sir.

Ques. How was it from the far end of the switch south of the Public road?

156 Ans. The road bed and ties and rails were torn up there where the engine lay, from the cattle guard up this way part of the way.

Ques. How far up this way?

Ans. Up to the switch. The best of my recollection is that it was farther than the switch.

Ques. How much farther?

Ans. About 30 feet, I should think.

Ques. From where the track was torn up on back to where the mule was struck, the road was about like it had always been?

Ans. Well, it was only the ends of the ties were torn up.

Ques. How many ties did you see torn up at the end?

Ans. I would think there were about 35 or 40 or 25, about 25, I think.

Ques. From where the mule was struck to about 30 feet north of that cattle guard, which is south of the Depot, you say there was 35 or 40 or 25.

Ans. Yes sir, about 25.

Ques. Did I understand you to say that the ties were entirely removed from the cattle guard back this way, that is north, for about how far? 30 feet?

Ans. I said 30 feet north of the switch, but not north of where the mule was struck.

Ques. Then did I understand you to say that from a point 30 feet north of the switch to where the mule had been struck, there was 35 or 40 broken ties?

Ans. I meant that many or more that had been torn up.

Ques. Then below where the mule was struck there was no ties torn up?

157 Ans. It tore up the whole road bed, about 30 feet south from where the mule was struck.

Ques. Did I understand you to say, Mr. Leneve, that from about 30 feet south of where the mule was struck all the ties from that point on were torn up?

Ans. No sir, I meant 30 feet north of the switch.

Ques. Then you mean 30 feet north of the switch on south, and from there they were all torn up?

Ans. I meant 30 feet from the switch this way the road was torn up.

Ques. From 30 feet from the switch on towards the public road, towards the Depot, it was all torn up?

Ans. Yes sir.

Ques. Then you did not see any evidence on these ties where truck wheels had left marks?

Ans. Yes sir.

Ques. How could you see that if they were all torn up?

Ans. Some of them were marked. I could see it readily.

Ques. If the ties were torn up how could you see the mark?

Ans. I did not mean that the ties were all torn up; I meant they were torn from the dirt.

Ques. Now, Mr. Leneave, you say that you had noticed the trains in passing over in the spring and on up to the time of the wreck, that the trains would rock, rock sideways?

Ans. They would sort of rock.

Ques. Did you see very heavily loaded freight trains go by there?

Ans. Yes, I have seen long trains early in the spring.

Ques. These freight trains are pretty heavy, I believe,

158 about how often would they pass during the early part of the Spring?

Ans. Sometimes twice a day.

Ques. Now, you say there was dirt in between the ties? Did that dirt appear there up as high as the top of the ties or above the ties.

Ans. It was about as high as the ties, the dirt was up on a level with the top of the ties, Yes.

Ques. Mr. Leneve, you say by reason of this rocking or giving motion, that there was a space of about 1½ or 2 inches where the dirt did not reach the ties at all; You say there was a space between the ties and the dirt?

Ans. Yes sir.

Ques. Did you see any mule tracks on there?
Ans. Yes sir.
Ques. I mean the time you were there looking at the wreck?
Ans. Yes sir.
Ques. Where were they?
Ans. They were close to where the mule was struck.
Ques. What part of the road bed?
Ans. On top of the ties and dirt.
Ques. In between the track in between the rails?
Ans. Yes sir, I saw them there on the dirt.
Ques. About the center of the track?
Ans. All along on the ends too.
Ques. Did you see them on the ties too? Were the mule tracks on the ties?
Ans. Yes sir.
Ques. Then in your opinion was the mule going down the
159 center of the track when it was struck?
Ans. I could not say.
Ques. Were there marks on the center?
Ans. Yes sir, they seemed irregular, going in and out?
Ques. Was he jumping or did he appear to be running?
Ans. Seemed like he had jumped—the tracks were some of them deep and some not so deep.
Ques. Where did you first see these tracks?
Ans. Just south of the Public crossing.
Ques. How far south of the public crossing?
Ans. Close to where the mule was struck. About 30 yards.
Ques. 30 yards this side of where the mule was struck?
Ans. 30 yards south of the depot close to where the mule was struck.
Ques. How far was it from where you first saw the track to where the mule was lying?
Ans. I judge, possibly it would be 10 feet from the track to about where the mule was lying?
Ques. From where you first saw the tracks, how far south of that did you first see evidence of the mule being struck?
Ans. Well, as I said, about 10 or 15 feet.
Ques. Then you only saw tracks, mule tracks, on the Railroad track for a distance of 10 or 15 feet?
Ans. From where I seen the mule tracks, it was, at the best of my recollection, about where the mule was struck, from the tracks to where the mule was struck?
Ques. What part of the mule did you see there?
Ans. Only the front part was there, it seemed to have been knocked off.
Ques. Which side of the track was that part of the mule on?
160 Ans. On the left hand side.
Ques. How far from the track?
Ans. About 12 or 15 feet from the track?
Ques. What part of the mule was that?

Ans. The head, shoulders, and fore legs and right down nearly to the center of the body.
Ques. That part was lying out 12 or 15 feet from the track?
Ans. Yes sir.
Ques. What time was that; were you there early?
Ans. Yes sir.
Ques. How soon?
Ans. It was about a quarter of three in the morning.
Ques. The mule had not been removed, had it?
Ans. No sir.
Ques. Did you notice any of the mule's body on the track?
Ans. No sir.
Ques. Any of the body part of the mule. Did you notice any of the body of the mule on the track?
Ans. Yes sir.
Ques. How far was that from where the other part was shoved off the track?
Ans. It was close to where the mule was struck. There was a part lying down on the track between the ties.
Q. Was that south of where you say the head and fore shoulders had been shoved off the track?
Ans. I think it was this side.
Ques. Then about where was that?
Ans. I could not say about that. I noticed a part of the mule on the track.
Ques. You did not notice between what ties?
Ans. No sir.
Ques. What size was that piece, how much?
161 Ans. Just a piece of flesh, a good size piece.
Ques. Was it as big as your head?
Ans. Yes sir.
Ques. Any larger?
Ans. Yes sir.
Ques. How much larger?
Ans. It was some larger.
Ques. Was it as big as a water bucket?
Ans. No, not as large as a water bucket. It was jammed down between the ties as though something had passed over it and mashed it down.

By P. B. MILLER, Att'y for Plaintiff:

Ques. In describing where that track was torn up there at that point where was it most torn up?
Ans. It was torn away mostly where the wreck occurred.
Ques. Below the bridge there; about where the cattle guard was?
Ans. Yes sir.
Ques. And from the cattle guard there north to just above the point of the switch, you may say the track was all torn away?
Ans. Yes sir.
Ques. Then from the place where the mule was shown to be struck

there until you got to that place, you said that you could see where the wheel ran on the track there?

Ans. Yes sir, they were not torn away altogether.

COLLINS WALLER Introduced for Plaintiff.

By Mr. P. B. MILLER, Att'y for Plaintiff:

Ques. What is your name?

162 Ans. Collins Waller.

Ques. Where do you live?

Ans. Morganfield, Kentucky.

Ques. Do you own an interest in the Harding Farm?

Ans. Yes sir.

Ques. Where is that farm?

Ans. It is about 4½ miles south, I reckon, from Morganfield, down the Illinois Central Railroad.

Ques. In Union County?

Ans. Yes sir.

Ques. Is Harding Station upon that farm?

Ans. Yes sir.

Ques. How many acres in that farm?

Ans. 968 acres more or less.

Ques. Does the farm extend above and below the Station?

Ans. Yes sir.

Ques. Does the farm border the railroad on either side?

Ans. Yes sir, for about 1½ miles.

Ques. State what kind of land it is at and about Harding Station with reference to being low or high land?

Ans. Well, the land around there is, starting from Morganfield, the railroad strikes the farm on a fill, and it goes out on a little fill; there is a place or two in there where it runs over a little ridge, a hill I should say, while it is through the bottom, most of the railroad bed is on the fill.

Ques. Did you have the management of that farm in 1903?

Ans. Yes sir.

Ques. Mr. Waller, state whether or not you were at the

163 farm and Harding Station in the Spring of 1903, just prior to this wreck?

Ans. I was there off and on all the time, I can not say just whether I was there just before the wreck occurred or not; my business took me down there both before and after the wreck.

Ques. Mr. Waller, tell the Jury there in your own way if you ever noticed how the ties were laid upon the road bed, and the condition of the ties as to the road bed prior to the Wreck at Harding Station and between the two cattle guards?

Ans. I never made any examination of the track in view of testifying as to its condition, but in walking backward and forward across it sometimes going up and down the track I noticed it. The track was bad and unsound the best I can remember. The ties were not covered in the middle along the middle between the rails, at places the dirt would extend off from the ties and would not come

up to a level with them; however, it would run close along by the side of the ties and form a little slosh there, it was worked up and down by the trains running over it causing the ties — work it and make sloshy and muddy. The end of the ties on the left going down the road would extend pretty well up above the ground, and the ties on the right hand side were not so high, there is a little grade right at the south and the right hand rail goes down just a little lower, and these ties seem to be slanting.

Ques. Mr. Waller, did you say slanting?

Ans. Yes, the ties seemed to be inclined that way, and a little beyond them there is a curve there.

164 Ques. I will get you to explain to the Jury what you mean by the ties working there; that is, state whether the dirt that was in the center of the track there was worked away or laying close to it?

Ans. I could not say how much or how many. The dirt in places was not tamped up under the ties.

Ques. Then if the dirt had worked away from the ties, did the dirt have any effect about rendering these ties secure?

Ans. I should not think so. Many of the ties had no dirt there to sustain them at all.

Ques. Did you notice the condition of these ties as to soundness?

Ans. There were some rotten ties there, that it, some were defective, but as to how many, and how much I could not say.

Ques. State whether or not both the rail and the road bed of the track on the left hand side going down, is not higher than on the other side?

Ans. The steel or iron rail was a little higher on the left hand side going down, but I could not say about the road bed.

Ques. I will ask you, Mr. Waller, if on the left hand side of the track below the station, on that curve, whether there was any dirt, or how much of the outside end of the tie was exposed.

Ans. I could not say how much.

Ques. Was the ends of the ties in any dirt at all or did they just extend up?

Ans. I could not say positively, my only observation was in walking backward and forward over the track, and I did not notice that particularly.

165 Ques. Mr. Waller, I will get you to look at this map here. This is the railroad, and this the dirt road running there up into the field, and here is the Station here, now just state to the Jury whether or not this is a satisfactory representation?

Ans. Yes sir, I think it is very good.

Ques. Well, now, Mr. Waller, what is this in here, this space in here?

Ans. That is an open space there that was left for station purposes. Part of it belongs to us and part belongs to the Illinois Central Railroad Company.

Ques. At the time of this wreck was there any cattle guard between this fence here on the south side running across to the station platform there to keep stock from coming up in there?

Ans. No sir.

Ques. There was no cattle guard or obstruction to keep cattle from coming in?

Ans. No sir.

Ques. State whether or not cattle or stock was ever upon this commons, and if so to what extent?

Defendants' Objection sustained by the Court, and question withdrawn by Plaintiff's Counsel

Ques. Well, Mr. Waller, was there anything to prevent stock from coming in and using on this commons?

Defendants objected to question and answer. Court Over-ruled Defendants' objection and Exception taken by Defendants.

Ans. No sir.

Ques. When cattle come in this place could they use all up and down the road both ways from one end of that commons to
166 to the other, on all that space?

Ans. Yes sir.

Ques. Did stock ever use in that commons there?

Ans. Yes sir.

Defendants objected to question and answer. Court over-ruled Defendants' objection to question and answer and Exception was taken by Defendants.

Ques. Now, Mr. Waller, is it not a fact that you have frequesntly had stock killed there?

Court sustained Defendants' Objection and Plaintiff's counsel excepted and avows that if witness had been allowed to answer, that he would have stated and it is true that he had frequently had stock killed at that point.

Ques. What is there back in here, Mr. Waller?

Ans. This road comes up here and runs up to a point on the hill and branches off to the left and goes down into the open bottoms; the straight road runs on up and is what is known as the Steve Anderson road.

Defendants objected to question and answer. Defendants' objection to question and answer over-ruled and Exception reserved.

Ques. You say there back of this road is an open botton where stock and cattle use?

Ans. Yes sir.

Ques. Do you know whether stock frequently collected upon this bottoms?

Defendants objected to question and answer. Objection over-ruled by the Court and Exception reserved by Defendants.

Ans. Yes, stock was in the habit of collecting there and fed there often, there was a little more or less grass around there and other stuff for them to feed on.

167 Ques. Were you down there the morning after that wreck?

Ans. Yes sir.

Ques. Did you see the part of the mule that was there?
Ans. Yes sir.
Ques. Just state to the Jury where it was with reference to the track?
Ans. The best of my recollection is that it was laying on the edge of the track and a part of it was up between the ties.
Ques. Which edge of the track?
Ans. On the left of the center.
Ques. State to the Jury where it was?
Ans. I never paid very much attention to the mule. I walked by it to go down to where the wreck was, and the best that I can recollect is that the mule was along about half way between the Depot and the cattle guard; it might not have been quite half way, south of the Depot.
Ques. Where was that part of the Mule's body that you saw with reference to the rail that the train run on, the left hand rail on the ties?
Ans. It was between two ties there down on the ground on the outside of the rail.
Ques. I will ask you if you noticed prior to the wreck in walking over that track whether or not—State rather, to the Jury how these ties were laid with reference to being regular or irregular.
Ans. I noticed in walking over the track, some I would have to take a shorter step and some a longer step.
Ques. Was that the distance of the ties between the curve on the south of the station to the cattle guard on the North?
Ans. Yes, more or less.

168 Cross-examination.

By H. D. ALLEN, Att'y for Defendants:

Ques. You spoke in regard to the left hand rail going south being higher than the right hand rail. I will ask you, Mr. Waller, if that curve there is not a curve to the right looking from the north?
Ans. The curve there at the station going down the track is to the right I think.
Ques. Then it was the left hand rail that was higher?
Ans. Yes sir.
Ques. I will ask if that was not necessary in the construction of a road bed in the curve, that the outer rail is up higher than the inner rail?
Ans. My general observation is that it is.
Ques. You say that you noticed the ties occasionally as you went down the rail road?
Ans. Yes sir, backward and forward.
Ques. You say that the dirt in some places was not up against the ties towards the top?
Ans. Yes sir.
Ques. About how many of the ties did you notice in that condition?
Ans. I could not say about that; I just noticed that in walking across it.

Ques. You did not know whether that extended to the bottom of the ties or not?

Ans. Some did. It seemed to be sort of a sloshy place, but as to how deep, I can not say.

Ques. Did you notice these sloshy places on that part of the Public road south or was it along north of the Public
169 road?

Ans. It was on both sides occasionally, I think you would find these places. In wet weather I think more than dry weather.

Ques. How long before this wreck occurred did you notice such places on that part of the track in the curve along south of the Public road.

Ans. I do not know, I can not say. As long as we have had this farm, about three years previous to the wreck.

Ques. Can you say, Mr. Waller, that on the 7th day of May, or for a week or two weeks before that you had noticed any such sloshings on that part of the track I have just mentioned?

Ans. As I said, I could not name any dates on which time I had seen this. I paid no special attention to the time; I could not say whether it was one week, two weeks, three weeks, or a month; I could not say.

Ques. Mr. Waller, you say you were there after the wreck.

Ans. Yes sir.

Ques. What part of the mule that you say was lying on the left of the track, there on the ground and seemed between the ends of the ties on the outside of the rails?

Ans. Yes sir, to the best of my recollection.

Ques. Did you see any of the mule anywhere between the rails?

Ans. No, I could not say that I did. My recollection is there was some blood there, looked like it had been struck and run over.

Ques. You say you saw evidence that there had been a collision of the train with a mule?

170 Ans. Yes sir.

Ques. What time after the wreck did you go there?

Ans. I went down that morning, early, after I got my breakfast.

Ques. How soon?

Ans. About 9 o'clock, I think. I was there before the wreck train came up from below. I did not notice. It was about 9 o'clock when I got there.

Ques. Did you notice any place where the track was displaced?

Ans. Yes sir.

Ques. About where was that?

Ans. Beyond the cattle guard.

Ques. Mr. Waller, I understand you to say that where the track was torn up was south of the Cattle guard?

Ans. Yes sir.

Ques. The track north of that was in what condition?

Ans. I did not pay any attention to that.

Ques. You did not observe that that had been torn up?

Ans. I could not say whether it was or not.

Ques. Did you observe whether or not any cars were standing on the track north of where the track was torn up.

Ans. I could not say, some cars were there.
Ques. On the Main track or on the switch?
Ans. I think on the main track.
Ques. About how many cars?
Ans. I could not say, I did not count them.
Ques. You say you noticed some ties being further apart than others, is it not a fact that some ties there, as is used generally in roads, were wider than other ties?
171 Ans. I can not say.
Ques. Mr. Waller, is it not a fact that ties vary in width?
Ans. I have seen some bigger ties than others.
Ques. You say in stepping on these ties some would be closer than others?
Ans. Yes sir.
Ques. Did you notice any derailment on the track there caused by those ties?
Ans. I did not pay any attention.
Ques. Did you notice that these ties that were wider apart were not as firm as the others?
Ans. I did not notice it.

James Leneve allowed to explain some answers the questions to which he did not fully understand, and upon request he is allowed to make an explanation.

COURT:

Ques. What is it that you want to explain, Mr. Leneve?
Ans. If I understood the question about the tracks of the mule and the railroad track, the part of the mule what was lying on the left hand side was about a foot or right in between the ends of the ties of the track; and the way I understood Mr. Allen's question was how far from the mule's tracks was the body of the mule and that was about 10 feet or maybe not so far.

By JOHN G. MILLER, Att'y for Pl'tiff:

Ques. You say that part of the mule's body was about 10 feet from where you saw the mule's track to where you *where you* say the mule's body was?
Ans. Yes sir.
172 Ques. And that part was right up in between the ends of the ties?
Ans. Yes sir.

By H. D. ALLEN, Att'y for Defendants:

Ques. And you say that a part of the Mule's body was right up in between the rails?
Ans. Yes sir.
Ques. And that was the part you say that was about the size of a bucket?
Ans. No sir, not so large as a bucket.
Ques. Where was the fore part?

Ans. It was just on the outside of the rail right in between the rails.

Ques. Mr. Leneve, did you not state to the Plaintiff's attorney on your direct examination, and did you not state to the Jury that the head and neck and foreshoulders of that mule were lying about 12 feet from the Railroad Track?

Ans. No sir.

Ques. I will ask you if you did not state in answer to my question, on cross-examination, that the head and neck and shoulders of that mule were laying about 10 or 12 feet from the Railroad Track?

Ques. No sir, I said about 10 or 12 feet from the mule's tracks, the best of my recollection.

GEORGE BUCHANAN, Introduced for Plaintiff:

Ques. Give us your full name?

Ans. George L. Buchanan.

Ques. Where do you now live?

Ans. In about ½ mile of Harding Station.

173 Ques. How long have you been living there?

Ans. A little over two years, the last time. I was born and raised there in that neighborhood, and have only lived away from there 3 or 4 years at different times.

Ques. Were you living there at the time of this wreck in May, 1903?

Ans. Yes sir.

Ques. How far were you living at that time from the place where the wreck occurred?

Ans. Something like ½ mile.

Ques. I will ask you, Mr. Buchanan, if you were acquainted with the track where the wreck occurred?

Ans. Yes sir, I passed there over it very often in going to Grove Center, going down for my mail, and sometimes when I was not at work I would go down to the Station and sit around, and meet the trains, and sometimes I would go down there on Sundays just walking around, I would go down there pretty often.

Ques. Where do you work?

Ans. At the time of the wreck I was working on the Harding farm.

Ques. On which side of the railroad?

Ans. On both sides. The railroad runs through the farm.

Ques. In going to you- work, would you not cross that railroad?

Ans. Sometimes, yes sir.

Ques. Would you walk up and down it or not?

Ans. Sometimes I would.

Ques. Were you acquainted with that particular track, with the point at the depot, and the point where the wreck occurred?

Ans. Yes sir.

174 Ques. Previous to that time?

Ans. Yes sir.

Ques. How long previous to that?

Ans. Not over a week at the outside, maybe not over one or two days.

Ques. Did you notice the condition it was in?

Ans. Yes sir, I noticed the condition.

Ques. Mr. Buchanan, just explain to the Jury, what the condition of the track was as to the manner of the ties as laid on the track, and the ballast, and conditions in that respect.

Ans. There was not any ballast there, if I understand what ballast is; the best I remember, the ties were just laid down and with probably not over two inches covered in dirt.

Ques. What do you mean by two inches covered?

Ans. I mean from the bottom of the ties.

Ques. And you say that the bottom of the ties were perhaps two inches in the dirt?

Ans. Yes, but not over that.

Ques. How thick are the ties?

Ans. Something like four or five inches, I do not know exactly, that is just a guess.

Ques. Is not a tie eight inches thick?

—. ——.

Ans. Was there a thicket over on the side of that place in there?

Ans. Yes, on the right of the road going south towards Princeton.

Ques. How far was that from where the cars went off the track, from where the mule was struck?

Ans. Not over 30 or 40 yards, on the south side of the track.

175 Ques. How do you know this land?

Ans. I was working on that farm at the time of the wreck.

Ques. Had you been working down there in that thicket?

Ans. No sir, I had not.

Ques. What is the nature of that ground in that thicket?

Ans. It is low and swampy.

Ques. Is it not a marsh?

Ans. Not exactly, it is low and swampy though.

Ques. What is the nature of the ground that this track is built on?

Ans. Well, that land the track was built on was, I suppose, would be considered very good, it was nothing like as low as where this thicket was at. The land gradually grew higher all the time; some higher.

Ques. What was the nature of the land on the left hand side?

Ans. That was higher there.

Ques. Is that along the — muddy?

Ans. No sir, the water drains through this — into the thicket.

Ques. How about the drainage from the main track?

Ans. I do not think at the time of the wreck that there was any way for the main track to be drained only by drainage from the side track.

Ques. What was the condition of these ties as to being sound?

Ans. I can not say that I noticed that.

Ques. Did you notice trains going by there?

Ans. Yes sir.

Ques. Explain what effect the trains passing over these ties has?

176 Ans. The trains would rock considerably from one side to the other along the ends of these ties where it was wet and it would cause the muddy water and dirt to slosh up over them. I noticed that.

Ques. Was that the case all along there at different places?

Question objected to as being leading and withdrawn by Plaintiff's counsel.

Ques. What was the condition of the road bed that the track and the ties lay on as to being wet or dry, what was the condition at that time?

Ans. I could not say that it was dry under these ties; I should think not, almost every time it would rain the water would collect under these ties, and it would naturally be wet. I have noticed trains when passing over it and the water would slosh up on the ends of the ties.

Ques. Mr. Buchanan, I will ask you whether or not in your opinion that would have a tendency to work the ties down into the dirt?

Defendants objected to question and answer. Defendants' objection over-ruled, and Exception taken by Defendant.

Ques. What was the effect, if you saw it there?

Ans. I should think it would in effect to kind of sink the ties down. I can not say what was the effect; I should think that would be the effect.

Ques. Then before this accident, did you see trains pass over there?

Ans. Yes, I have seen trains pass over there right up previous to the accident.

Ques. What effect did these trains have in passing over this

177 track?

Ans. The track seemed to go down and the mud would slosh up over the ends of the ties.

Ques. When the train passed over there would it slow up any?

Ans. It would slacken up.

Ques. How far after the train passed was it you say that this track would rise again?

Ans. I could not say, I did not pay particular attention to that.

Ques. Could you not give us some estimate?

Ans. No sir, not hardly.

Ques. When the train would sink down and then rise up again, how low down would it sink?

Ans. I could not give you any definite answer about that. I just noticed as the wheels was rolling off the track would sink down and then rise up again?

Ques. I will ask you whether or not the ties had worked,—literally worked the dirt from along by the side of the ties; and I will

ask you whether or not there was a space between the tie and the dirt in the middle of the track?

Ans. I could not say as to that.

Ques. Did you see a mule lying there after it was cut in two?

Ans. I saw a part of it.

Ques. Describe how it was cut?

Ans. I did not pay any attention to it much, it was cut nearly in two, the head and neck and fore shoulders of the mule was lying on the left hand side of the track going South.

Ques. Was it cut end ways or square across?

Ans. I can not say, I think square across.

178 Ques. Where was the other half of the mule?

Ans. I do not know, I suppose it was below up in that wreckage, I never saw it there.

Ques. Well, now, Mr. Buchanan, describe the condi*d*tion of the track after the wreck, down at the wreck when you got there?

Ans. The track was completely torn away from the wreck something like 35 or 40 feet, probably a little farther than that below where the mule was struck, the track was all piled up in amongst the cars.

Ques. About 35 or 40 feet beyond to where the engine was at, you say the track was swept away clean?

Ans. Yes sir.

Ques. Was there any of the track left along there?

Ans. No sir.

Ques. Where did the engine lay?

Ans. It was on the left hand side on south of the tr*u*stle.

Ques. Now, Mr. Buchanan, I will ask you if you can give us any idea about the size of the depth of that cattle guard there? Was it a culvert or cattle guard?

Ans. I should think it would be called a culvert. Well, I reckon it was 7 or 8 feet wide and possibly 5 feet deep; that is the best of my recollection.

Cross-examination by JOHN W. LOCKETT, Att'y for Defendants:

Ques. This culvert was beyond where the mule was struck, south of the mule and it took the water from the west side of the track to the east side and down into that thicket?

Ans. It was supposed to.

Ques. That was the object of it?

179 Ans. Yes sir.

Ques. From the depot down to where that culvert was was not the road bed on a gradual fill?

Ans. Yes sir.

Ques. Where that mule was struck, how high was the fill? About 2 feet?

Ans. I could not say. I expect it was something near two feet and it inclines in height*h* until it gets to that Culvert.

Ques. The water you say would slosh up when trains would pass; how far did this extend, did you see anything of that sort?

Ans. I could not say.

Ques. Did you not see that condition in very wet weather?
Ans. I could not say that either, it was different at times.
Ques. Was it not always in extremely wet weather?
Ans. I can not say.
Ques. Was it in right dry weather?
Ans. I could not say.
Ques. Was it not right dry on May 7th, 1903, dry enough to plough?
Ans. I remember it was dry enough to plough.
Ques. At that time could you say that there was any point between the crossing of the public road and the place where the mule was struck, that there was any wet places in the track?
Ans. I could see that the water was in under these ties; the water would naturally collect under these ties there.
Ques. Was it there at the time of the wreck?
Ans. I should think so.
Ques. Did you know anything about it?
180 Ans. I can not say at the time of the wreck.
Ques. If that road bed was two feet above the level of the ground what would keep the water under the ties?
Ans. There was no way for the water to get over the switch to get off this track at all.
Ques. And it is a fact that this switch is not ballasted?
Ans. No sir.
Ques. There is no fill at all?
Ans. I can not say.
Ques. Is not the switch lower than the main track?
Ans. It is some lower than the main track. It is some lower but not low enough for the water to drain there.
Ques. If the main track had dirt between the ties and the switch had no dirt between the ties, what would prevent it from draining that way; How do you know that it would not drain through there?
Ans. I could not say, only the trains run there.
Ques. Why did you say that the switch track drained on the main track if you did not know?
Ans. I could see when in passing over.
Ques. Was that not in very wet weather when the water would gradually run off?
Ans. I can not say anything about the weather.
Ques. Mr. Buchanan, is it not true that you did observe that track later than the first of April in that condition?
Ans. I can not say; I think it was later than that; not over a week before the wreck.
Ques. Did you notice this sloshing of the water later than a week before the wreck?
181 Ans. I can not say.
Ques. Mr. Buchanan, what has enabled you to fix any time at all?
Ans. Just being there.
Ques. You had no interest to observe that railroad track?
Ans. No sir, none at all.

Ques. All you saw was just walking to your work and going to Grove Center?

Ans. Yes, and sometimes I would walk around and go down to the depot just to pass away the time.

Ques. Did you walk along this track to go to Grove Center any time this month?

Ans. Yes sir.

Ques. Do you remember how long before this wreck?

Ans. I think it had not been over a week.

Ques. The track, as I understand you from the cattle guard or the culvert, was torn up beyond that all together south of the cattle guard?

Ans. I do not think you understood me to say everything beyond that.

Ques. It was not torn up at all?

Ans. It was torn up some.

Ques. How far was the engine below that culvert?

Ans. I do not remember.

Ques. Did you say that the road bed and rails and the ties in that road bed were not torn up?

Ans. No sir, I did not say the road bed. The wreck was piled up there. The boxes were piled up on that track and the engine was off on the side.

182 Ques. You do not know how far the track was from that place; How far was the engine from that place?

Ans. The engine was some below; I could not say how far.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. You stated in answer to a question from the Defendants' counsel that the water stood upon the main road bed or main track, where the switch run with it, because there was not sufficient fall or pitch for it to run across the switch and off of it?

Ans. Yes sir, that is correct.

Ques. State whether or not the cross ties under the switch where the two tracks came together, the same ties *is* not used in the main track and the switch?

Ans. Yes, where the switch comes together, it is I think. But above the switch where it struck the mule, I think they use separate ties.

Ques. Both the main track and the switch track *is* along on a level?

Ans. Yes sir.

By H. D. ALLEN, Att'y for Defendants:

Ques. You say that up here, Mr. Buchanan, where the mule was struck, there was a separate tie for the main track and the switch track?

Ans. Yes sir.

Ques. Then, there is a distance between the two tracks there, is there not?

Ans. Yes sir.

Mr. BEN PERKINS Introduced for the Plaintiff.

183 By Mr. P. B. MILLER, Att'y for Plaintiff:

Ques. State your name?
Ans. Ben Perkins.
Ques. What is your occupation?
Ans. General foreman.
Ques. What is your age?
Ans. 25 years.
Ques. Where do you live?
Ans. Grove Center.
Ques. How long have you been living in Grove Center or that neighborhood?
Ans. I have been living at Grove Center right close to a year.
Ques. What is your occupation?
Ans. I work at a stave mill.
Ques. What were you employed or what was your position to observe the railroad track between the cattle guard north and the cattle guard south of Harding Station in the Spring and up until the wreck on the Illinois Central Railroad, at that point on May 7th, 1903?
Ans. I seen it several times, working there on the Harding farm, and crossing there while going to work sometimes on one side of the track and sometimes on the other.
Ques. You state then, that you were employed at work on the Harding farm?
Ans. Yes sir.
Ques. Is the Harding farm the Waller farm?
Ans. It is now.
Ques. About how long before this wreck was it that you had been upon the track at the place named?
Ans. I do not know, it might have been a week or maybe longer.

184 Ques. State whether or not at the time mentioned you had observed trains passing over this track and what effect it had upon the track?
Ans. I have seen trains passing over before the wreck and the ties in some places were on sort of wet places, and from under the ends of the ties the water would slosh up over the ties from under them.
Ques. What effect would this have upon the train, and the track and rails and the road bed?
Ans. It looked like it would sway and rock as it went over the track.
Ques. I will ask you if you noticed whether the track would spring up and down when the train was going over?
Ans. Yes sir; I believe it would a little.
Ques. State the condition of the ties there as to the ballast being under the track or on top or otherwise?
Ans. The ties looked like they might be about half buried in the dirt alomg there.

Ques. At the ends of the ties or in the middle?
Ans. All along, they were all about half buried.
Ques. Mr. Perkins, tell the Jury there whether the dirt had been thrown between the ties or whether the ties had just worked down?
Ans. I never seen them when they laid them there. It did not look like there had been any dirt put in along between the rails.

By H. D. Allen, Att'y for Defendants:

Ques. Where do you live?
Ans. At Grove Center.
185 Ques. Were you residing in this County at the time of the wreck on the Illinois Central Railroad on the day of May 7th, 1903?
Ans. Yes sir.
Ques. Did you ever work for the railroad?
Ans. No sir.
Ques. What is your occupation now?
Ans. I am working at the stave mill at Grove Center.
Ques. You say you worked on the Harding farm in 1903?
Ans. Yes sir.
Ques. What time did you leave the Harding farm?
Ans. Last May, May 1904, or April 1904, about that time, I do not remember exactly.
Ques. You say you were living there at the time of the wreck?
Ans. Yes sir.
Ques. Who were you working for?
Ans. Mr. Moss Rudd.
Ques. Did you know this mule that was killed?
Ans. Yes sir.
Ques. How tall was he?
Ans. I do not know, I never measured him.
Ques. In your opinion, was he about 16 hands high?
Ans. He was 15 or 16 hands I suppose.
Ques. Did you know where he was on the night of the wreck before it occurred?
Ans. He was in the lot the last time I saw him.
Ques. Fastened up?
Ans. Yes sir.
Ques. Well, now you say that you had noticed this track in working, and sometimes going to Grove Center, and some-
186 times in crossing the track?
Ans. I said in crossing the track; I have been down there on Sundays and in the week days when I could not work.
Ques. Do you know when this wreck occurred?
Ans. The 7th of May.
Ques. What year.
Ans. 1903.
Ques. How long before that time was it that you had been over this part of the track south of the road crossing and at the road crossing?
Ans. I do not remember exactly, it was not long before.

Ques. Was it a month or two months?
Ans. No, not hardly so long.
Ques. Well, how long?
Ans. It might have been as long as three weeks.
Ques. And might have been longer.
Ans. No sir.
Ques. You say about three weeks?
Ans. Yes sir.
Ques. Was that sort of a wet time then?
Ans. Pretty wet time, yes sir.
Ques. It was not wet at the time the wreck occurred?
Ans. No, I suppose not, it was dry enough to plough down in that Section, and on that Harding farm it was dry enough to plow and we were ploughing there.
Ques. Three weeks before that time it was not so dry?
Ans. No sir.
Ques. When you were down there the three weeks prior to the *to the* wreck did you notice any trains going over there?
187 Ans. Yes sir.
Ques. What kind of trains?
Ans. Freight and passenger trains.
Ques. Did you notice them passing over this track?
Ans. Yes sir.
Ques. Would you be up along the side of the train, in front or at the Depot?
Ans. I would be at the side of it. Of course I could see it as it went on from me.
Ques. Did it go over all right?
Ans. Well, I suppose it did.
Ques. It went on over?
Ans. Yes sir.
Ques. Did you notice any rocking?
Ans. It looked like it would sway a little.
Ques. That was as it was going around the curve it would sway a little?
Ans. Yes sir.
Ques. You did not see any track give away?
Ans. No sir.
Ques. Did you see any trouble there at all?
Ans. Not at that time.
Ques. Did you ever notice the ties. You said they looked like they were about half buried in the dirt?
Ans. I guess they were about half buried.
Ques. The whole length of the ties?
Ans. The ends of the ties were not, but along in the center was.
Ques. Now, right in the center, was there any dirt right in
188 the center?
Ans. It all looked to be alike to me, right along where the wreck occurred. About half way up on the ties.
Ques. How much of the dirt would be upon the ties?
Ans. I do not know.

Ques. How far, two or three inches?
Ans. I do not know.
Ques. You know how thick a tie is?
Ans. No sir, I do not know.
Ques. These ties were covered in the dirt about solid half way down?
Ans. Yes sir.
Ques. And the dirt stuck right close to them?
Ans. No sir, not at all, most of them looked like the ties had worked down into the dirt.
Ques. Now, did you ever notice the ties particularly from the Depot there south to the Culvert?
Ans. No, I never noticed them in particular.
Ques. Whether they were sound or rotten or otherwise?
Ans. No sir.
Ques. You can not say what was the condition of the ties?
Ans. No sir.
Ques. You did not see any rotten ties or unsound ties?
Ans. I never noticed them, I may have seen them.
Ques. Mr. Perkins, I will ask you if with the exception of being sort of sunk down as you say, and the dirt not quite up to some of them, did the ties appear all right otherwise?
Ans. I never noticed about that.
Ques. Did you not notice anything wrong with the ties there?
Ans. I never noticed whether there was any rotten ties
189 there or whether there was any sound ties there or not.
Ques. Did not notice any being rotten or sound?
Ans. No sir.
Ques. Never noticed how they were spiked?
Ans. No sir.
Ques. Did you notice them after the wreck? Were you there after the wreck?
Ans. Yes, I was there after the wreck.
Ques. What was the condition of the ground from the culvert or cattle guard; going south, the condition of the road bed and track?
Ans. Well, I never noticed much about that. I know the track was torn up a piece the other side of the cattle guard, the ties and all along.
Ques. You did not see any ballast did you?
Ans. The ballast that was left was not much.
Ques. Did you see where the mule was struck?
Ans. I saw where the mule was lying, that is a part of it.
Ques. Where was that?
Ans. Right close to the track.
Ques. About how close?
Ans. I reckon a foot maybe of the ties.
Ques. It might have been right on the ties?
Ans. I do not know. It was close.
Ques. What part of the mule did you see there?
Ans. The fore part.
Ques. Was there any embankment there, was there any fill there?

Ans. The Railroad had a bed there.

Ques. How far beyond the ties did the dirt extend or did it
190 go any further than the end of the ties?

Ans. I never noticed about that.

Ques. Was the mule on the road bed or just down on the side of the railroad bed on the ground?

Ans. It must have been on the road bed. He was in close to the track.

T. E. CAMBRON Introduced for Plaintiff.

By —— MILLER, Att'y for Plaintiff:

Ques. State your name, age, and residence?

Ans. T. E. Cambron, age 26 years, and reside in Waverly, Kentucky.

Ques. What is your occupation?

Ans. Farmer.

Ques. How long have you lived in Union County?

Ans. All my life.

Ques. Mr. Cambron, I will get you to state to the Jury whether you went to the wreck on the Illinois Central Railroad at Harding Station, May 7th, 1903?

Ans. I went to the wreck that morning.

Ques. What time did you get there?

Ans. About 10:30.

Ques. Did you see the mule?

Ans. I saw part of the mule.

Ques. Describe to *to* the Jury the part of the mule that you saw, and how it lay in reference to the track?

Ans. Part of the mule, the fore shoulders and head was cut off and lay on the east side of the track right close to the rail, in among the ties, and the other part of the mule when I saw it was wedged in between, the track was torn up down at the cattle guard
191 and above the cattle guard a small part. I could not say how large a space there was between the tracks. The ties down there at the cattle guard were all torn up and thrown in that cattle guard.

Ques. You say the cattle guard south of the wreck?

Ans. Yes sir. That is, I saw where it had been.

Ques. Mr. Cambron, did you notice the condition of the ties where the mule was struck, and along that curve with reference as to whether they were regularly laid the same width there or otherwise?

Ans. They were irregular, some of them had no tamping under the end at all, I could run my foot in under the end of some of them, and some were not as high at the end as some, and some few of these were broke in the middle.

Ques. You say you could get your foot in under some of the ties at the end?

Ans. Yes sir.

Ques. Mr. Cambron, I will ask you to state to the Jury whether

the cross ties where the rail comes down there on the east side of the track going down that curve, were that way or otherwise?

Ans. ——.

Ques. Was there any dirt on the end of them to where the rail run?

Ans. None, from where the marks was to where the track was torn away.

Ques. Was there any dirt on the inside?

Ans. None.

Ques. Where was there any dirt?

Ans. There was a little in the center.

192 Ques. To what extent?

Ans. From the pitch of the middle of the center.

Ques. Where was the engine?

Ans. About 25 feet beyond that little slough on the east side of the track, about two feet of the head of the engine was laying in the field, about two feet over the fence line.

Ques. Do you mean that cattle guard?

Ans. Yes sir, south of that slough.

Ques. How many cars were wrecked?

Ans. I do not remember whether it was 7 or 8. I did know at the time, but I do not remember now.

Ques. What was the occasion of your going down there?

Ans. It being the only wreck I had ever had the chance to see, I went to see it.

Ques. You are not related to Mr. Sheegog, are you?

Ans. No sir, I had never seen him before.

Ques. This slough you speak of is the same thing the others call the culvert or cattle guard?

Ans. Yes sir.

Cross-examination.

By JOHN W. LOCKETT, Att'y for Defendant:

Ques. How much was that beyond the switch rails there?

Ans. At that time I had a pretty good idea, but then, now I could not say, exactly; something like 40 or 50 yards, perhaps.

Ques. How many cars were standing on the track when you got there?

Ans. There were none on the main line.

193 Ques. How many cars were standing on the switch?

Ans. I do not remember.

Ques. How did you come to observe the ties about the dirt being between them?

Ans. I had never seen another wreck and I wanted to see everything I could about it. That was my business down there.

Ques. Who employed you to do that? As you spoke of your business, what did you mean by your business?

Ans. When I go to see anything, I make it my business to find out all I can; and I wanted to find out all I could about this wreck and what caused it as I had never seen a wreck before.

Ques. Well, where the track was torn away, that was as far back as where the mule was struck?

Ans. No sir, it was not. That is from where it indicated that the mule had been struck.

Ques. You say that you could run your foot in under the ends of the ties?

Ans. Yes sir.

Ques. Do the ties not extend out some two feet out from under the rails?

Ans. It is some 12 or 15 inches out past the rails. And under the ends of some of them I could put my foot.

Ques. How far back from the ends of the ties could you get your foot?

Ans. As far as my instep.

Ques. How far back from the end of the tie was there any dirt?

194 Ans. I do not know, I could shove my foot under the end of the tie.

Ques. How far from the end did you put your foot?

Ans. I put my foot under at the end of the tie.

COURT:

Ques. Was there still a space under there where you could not reach with your toe that there was no dirt?

Ans. Yes sir.

Ques. How did you come to put your foot under there?

Ans. I wanted to see how far up under the end it was to the dirt because I noticed that it was not as it should be.

Ques. Are you a Railroad man?

Ans. No sir, but I ride over the railroad sometimes.

Ques. How long were you at the wreck?

Ans. From the time I got there until after the men were gotten out and taken away. I was there when the track was laid over there for the up train to come over it.

Ques. Did the up train pass over it that evening?

Ans. Yes sir.

Ques. Did you go down on the train and come back on the train?

Ans. I went down on the train and come back in a buggy after the track was laid.

Ques. Who did you come with?

Ans. Jim Threlkeld.

Ques. Where were you living at the time?

Ans. Here in Morganfield.

Ques. What was your business then?

Ans. Grocer and Restaurant business.

Ques. Are you engaged in that now?

195 Ans. No sir.

Here the answers of each of the defendants were considered read and put in evidence, and by motion of the Defendant the amended answer of the Defendant the Illinois Central Railroad Company was allowed read and considered in evidence in con-

nection as part of the amended answer to which reading of the amended answer the Plaintiff objected and makes an exception and to which reading of their answer the Defendant objects and reserves an exception.

Mr. JOHN G. MILLER: "If the Court please we now desire to introduce Dr. Wigglesworth's Life Tables as shown in 3rd Bush, or 66 Kentucky Reports and read there where it explains the expectation of life and let it be treated as evidence by the Jury.

Defendants objected. The objection of Defendants over-ruled by the Court and exception reserved.

Mr. MILLER, Att'y for Plaintiff: By said table it is shown that the expectation of one at the age of 28 years is 31.08 years.

Mr. Ross RUDD re-called.

Mr. JOHN C. MILLER, Att'y for Plaintiff:

Ques. Mr. Rudd, regarding this cattle-guard or culvert or trustle; I shall ask you whether or not the rails of the culvert were piled up there at the bottom of the bridge or ditch or top?

Defendants objected to question and answer. Objection over-ruled and Defendants excepted.

196 Ans. The best that I remember it, it was.
Ques. That is the best of your recollection?
Ans. Yes, at the time of the accident, the best I remember it had all been swept up clean. The next morning after the wreck they had cleaned up and you could not tell very much about it then.
Ques. What was the condition of the sills down under that bridge?
Ans. They were all torn out.

By H. D. ALLEN, Att'y for Defendants:

Ques. The whole thing was torn out?
Ans. Yes sir.

Here the counsel for the Plaintiff announced that they would rest their case except that they had a witness that they wanted to introduce later on as soon as his presence was ascertained and upon whom process had been executed.

Mr. J. J. CLARK Introduced for Defendant.

By H. D. ALLEN, Att'y for Defendants:

Ques. Mr. Clark, where do you live?
Ans. Nashville, Tennessee.
Ques. In what are you engaged?
Ans. General foreman.
Ques. On what road?
Ans. On the Illinois Central.
Ques. Were you living at Henderson, Kentucky in May, 1903?
Ans. Yes sir.
Ques. In what capacity were you employed then?

Ans. As general foreman of the machinery and engines.

197 Ques. With what Company?

Ans. The Illinois Central Railroad Company.

Ques. Did you know this engine that was wrecked there at Harding Station on the morning of May the 7th, 1903?

Ans. Yes sir. At one time.

Ques. At one time you say?

Ans. Yes sir, at the time it went out. She was brought to the shop the day before.

Ques. Did you inspect it?

Ans. Yes sir.

Ques. What was its condition?

Ans. It was in good condition.

Ques. Was there any defect about the cow-catcher?

Ans. No sir.

Ques. How was that attached to the engine?

Ans. It was properly attached with bolts and braces.

Ques. How high above the road?

Ans. Anywhere from four to six inches, which is a safe height for a pilot.

Ques. How long had you been engaged as mechanic and foreman?

Ans. I have had eighteen years' experience in the business; 15 years as Mechanic and the last as foreman.

Ques. Did you know Mr. Sheegog?

Ans. Yes.

Ques. Did you see him on the day this run was made?

Plaintiff objected to question and answer. Plaintiff's objection over-ruled and exception made by Plaintiff.

Ans. I talked with him that afternoon.

Ques. Did Mr. Sheegog examine that engine before he

198 started out on that run?

Ans. I could not say positively, but it was customary for the engineers to examine their engines before they started out on a run.

Ques. How long had Mr. Sheegog been running between Princeton and Henderson?

Ans. As near as I can remember, about three weeks. He had been assigned to that division by the Master Mechanic.

Ques. How often did he go over this track at Harding Station?

Ans. As it is called making a run, he was on about three times every week.

Ques. You mean he would go both ways three times a week in order to make a run from Princeton to Henderson and back?

Ans. From Paducah to Henderson.

Ques. Mr. Clark, did you go down to that wreck?

Ans. Yes sir.

Ques. What time did you go?

Ans. Between five and six o'clock.

Ques. What was the engine in the shop for?

Ans. She was there for the purpose of washing out the boiler and for making minor repairs if necessary.

Ques. And she left in good condition?

Ans. Yes sir.

Ques. What was the condition of the wreck; just describe it as best you can.

Ans. The engine had left the track and had turned over on her side; several cars were piled up, I think five or six something like that.

Ques. Mr. Clark, I am requested to ask if you know the number of that engine?

199 Ans. Yes, #282.

Ques. Mr. Clark, with reference to the public road that crosses the track there, how far was the engine south of that?

Ans. I am not well posted on the distance from there, but I noticed from the Depot pretty close, and it looked to be about 150 feet.

Ques. Were any of the cars on the main track when you got there?

Ans. Yes, there were several cars on the track but I never counted them.

Ques. How far down did these cars on the track extend from the Depot?

Ans. Well, I can not say as to that?

Ques. How many cars remained on the track south of the Depot?

Ans. I did not count them; I do not remember. The cars was down below where the mule was struck in as much as I had to go around the cars to go back to where the mule had been struck.

Ques. Do you remember how many cars you had to pass before you got to where the mule was struck?

Ans. Three or four I think.

Ques. Mr. Clark, I will ask you what was the condition of this road bed under these cars?

Ans. The road bed was not torn up, we moved the cars back over it.

Ques. Did you examine this track after the cars were moved back over it?

Ans. No sir, not particularly, only to notice the marks on the rails?

200 Ques. How many, if any of the cross ties did you observe to be broken between the point where the mule was struck and the end of the cars where the Wheel remained on the track?

Ans. I did not notice that.

Ques. How many of the ties were remaining on the track there, and what was the condition and all?

Ans. I told you that I did not examine only as much as to notice if I could see if there was any defect in the engine.

Ques. What was the condition of the road-bed at that time as to being wet or dry?

Ans. I never noticed any water or any mud, I do not suppose it was very wet.

Ques. What was the character of the road-bed, was it on a cut or on a fill?

Ans. It was on a gradual fill about two feet high.

Ques. Did you notice how high the fill was between the rails?

Ans. No sir.

Ques. Did you see any ties that had been displaced; that is, that had been shoved out of place before the wreck?

Ans. I noticed some displaced, but I don't know whether it was done before the wreck or afterward. Then some of the track was completely torn up but that was all mostly past the switch.

Ques. What caused that engine to be derailed from what you could see there?

Ans. The engine ran over a mule, and it was piled on the left side of the rail and on this slight curve it drove the obstruction
201 against the wheel, mounting the left engine truck, throwing the engine off on the left hand side, about 12 inches from where the mule was struck; she stayed to the rail until she got to the lead rail of the switch and from there it showed very plainly that she jumped the track entirely and throwing the engine clear off over the side of the right-of-way.

Ques. Mr. Clark, I will get you to state why you say that the Pony trucks had left the track just about 12 inches from where the remains of the mule was laying?

Ans. I could tell by the marks. I noticed the marks on the outside of the ties. These marks continued on up to this rail here and the right hand wheel of the engine struck this showing very plainly where it throwed it off, and further on down it began tearing up the track.

Ques. State at — point the lead rail or guard rail comes in to the main track?

Ans. Right along there, right along on this side, as I can remember, just this side of where the cattle guard was the engine left.

Ques. Mr. Clark, I will get you to explain to the Jury there, what this lead rail, guard rail, or switch rail is?

Ans. That is out of my line of business and I prefer not to do so.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. Mr. Clark, what time of the night did that train on which Mr. Sheegog was engineer, leave Henderson on the night of the accident?

Ans. The schedule time for leaving was 10:30, but whether she left at that time I can not say.

202 Ques. Where were you when she did leave?

Ans. I might have been at home, where I should have been.

Ques. You then were not there and did not see it leave?

Ans. No sir.

Ques. You did not see Mr. Sheegog that afternoon before he left that night?

Ans. Yes sir, I saw him and talked to him.

Ques. You saw him then on the night of the 6th?

Ans. I saw him that afternoon before he left in the night.

Ques. Did he leave on the 6th?

Ans. Yes sir.

Ques. How many cars were in that train?
Ans. I do not know.
Ques. You did not see what time it left, whether 10, 11 or when?
Ans. No sir.
Ques. Where was Mr. Sheegog, when you saw him?
Ans. In my Office.
Ques. How long had you been acquainted with him?
Ans. At least six months.
Ques. I believe you said he had been there on this run about three weeks?
Ans. Yes sir.
Ques. Was his regular run night on the main line?
Ans. It had been until he was assigned to this District.
Ques. What train did he pull?
Ans. 354 and 355. He pulled 354 leaving Princeton and 355 returning.
Ques. What time did 354 leave Princeton?
203 Ans. *I do not — what* time it left Princeton.
Ques. What time was it due to arrive *to arrive* in Henderson?
Ans. 5:30 A. M.
Ques. It then left Paducah sometime in the night and would pass Harding Station in the night, and arrive at Henderson about 5:30 A. M.; then that was 354? and 355, his returning train was due to leave Henderson at 10:30 and go back in the night?
Ans. Yes sir.
Ques. How far is it from Henderson to Morganfield?
Ans. 24 miles.
Ques. And Harding is about 5 miles further?
Ans. Yes sir.
Ques. Then that makes it about 29 miles from Henderson to Harding Station. Did you know of him making the trip on any other train except the No. 354 and 355?
Ans. ——.
Ques. The through freight is a class higher than the local?
Ans. Yes sir; and runs about as regular as a passenger; runs daily and on Sunday.
Ques. I will ask you whether or not this is a fast run here?
Ans. In answering that question I am going out of my line of business. I do not know positively.
Ques. I will ask you whether or not this pilot on this engine that he was running on that night, was what is known as the "Stub" pilot?
Ans. Yes, it had the short pilot attached to it.
Ques. The stub pilot is the pilot that is used on the rear end, on the back for the —; the size used on — work?
Ans. Yes, some.
204 Ques. Have you a diagram of that pilot, or any drawing or representation of it that you could show us?
Ans. No sir.
Ques. Do you know whether Mr. Sheegog had the same engine on this run that he had on the main line?

Ans. No sir, this was a different engine.

Ques. Did he have the same engine all the time during these three weeks?

Ans. No sir.

Ques. How many times had he run this particular engine? No. 282?

Ans. I do not remember. I think this was about the first time he run it as near as I can remember.

Ques. Your name is what?

Ans. J. J. Clark.

Ques. You are the same J. J. Clark that testified on the trial at Henderson Kentucky, in the case of Manion's Administrator *vs.* The Illinois Central Railroad Co. are you not?

Ans. Yes sir.

Ques. You were a witness for the railroad in that trial?

Ans. Yes sir.

Ques. And was sworn?

Ans. Yes sir.

Ques. I will ask you if you were not asked at this trial about this examination of this track; if you were not asked this question:— "Will you tell the Jury now, what was the condition of this track below where the engine went off and the condition of this railroad." I will ask you if you were not asked this question in that trial at Henderson?

Ans. I do not remember.

Ques. I will ask you if you did not make the answer:—

205 "The only examination I made was to see where the mule got on there. The only thing I noticed was to see where the mule got on the track." Now as a matter of fact did you pay any attention to it?

Ans. Only as a casual observer, that is all.

Ques. What was the weight of that engine, Mr. Clark?

Ans. It was 65 or 70 tons.

Ques. Does the weight of the engine rest on the pony truck?

Ans. No sir, not all. 15 tons rests on the pony truck when on the track.

Ques. On a level?

Ans. Yes sir.

Ques. Well, it is a fact that the pony truck may go off and run a long way without de-railing the engine?

Ans. Most assuredly so.

Ques. Would it go ¼ or ½ of a mile?

Ans. It may, yes.

Ques. During that time the weight of the engine, the 15 tons is not resting on the pony trucks?

Ans. Very little is taken off then the weight of the engine is equalized with large springs.

Ques. The pony trucks sink down further do they not? when they go off the rails?

Ans. Yes, and so does the engine.

Ques. If you were to knock those trucks clear off; the engine, would not go down?

Ans. No sir.

Ques. The Engine could run along without the trucks?

Ans. Yes sir, it could run, but it would be dangerous.

206 Ques. What is the standard height of a cow-catcher from the rail?

Ans. Anywhere between 3¼ to 6 inches, from 4 to 6 inches.

Ques. Is there not a standard height*h* that they follow in building these cow-catchers?

Ans. No not exactly, the standard height*h* is from 4 to 6 inches.

Ques. What was the height*h* of this cow-catcher above the rail at the moment it left Henderson on the night of the 6 of May or on the morning of the 7th?

Ans. The exact height*h*, I could not give. I looked at it and if it had been higher or lower, I would have noticed it.

Ques. When did you notice it.

Ans. Before dark.

Ques. Did you just pass it?

Ans. It is my business to inspect the engines.

Ques. Then explain how you inspect engines, Mr. Clark?

Ans. They are inspected by looking at them and examining them to see if they need any repairing.

Ques. Then if you noticed it at that time, I would like for you to state just how high this pilot was from the rails?

Ans. It was within the limits. No man can tell just how high it was by looking at it.

Ques. Had it been lower or higher, do you think you would have noticed it?

Ans. Yes sir. Had it been too high or too low, I would have noticed it.

Ques. Would you — noticed it if it was 3 or 4 inch*ed* too high or too low?

Ans. Yes sir.

207 Ques. What is the height*h* of a rail?

Ans. 4 inches.

Ques. What is the thickness of it?

Ans. They vary from 7½ to 8 inches, I am no track man and can not say.

Ques. That then would make the distance between the cow-catcher if it were 4 inches above the rail to the bottom of the tie, about 16 inches.

Ans. Well, I suppose it would.

By JOHN W. LOCKETT, Att'y for Defendants:

Ques. Was that cow-catcher repaired from the time Mr. Shegog brought it to the shop until he took it out?

Ans. No sir.

Ques. In allowing these pony trucks off of the rail, you say it might run some distance before the engine would be derailed?

Ans. It would not run that way if it struck any obstruction.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. Did Mr. Sheegog bring that engine in there on the morning of the 6th?

Ans. No sir.

Ques. Then, what do you mean in saying that that pilot was not repaired from the time Mr. Sheegog brought it in until he took it out?

Ans. I said that it was not repaired from the time it was brought into the shops until it was taken out by Mr. Sheegog.

Ques. Then as a matter of fact, he did not bring it in?

208 Ans. I never said he did.

Ques. Well, what did you say?

Ans. I said he did not bring it in.

Ques. —

By JOHN W. LOCKETT, Att'y for Defendants:

Ques. Who brought it in?

Ans. Engineer Seibert.

Mr. FEENEY Introduced for Defendant.

By H. D. ALLEN, Att'y for Defendants:

Ques. What is your name?

Ans. *James* Feeney.

Ques. What is your occupation?

Ans. Locomotive engineer.

Ques. On what road?

Ans. On the Illinois Central Railroad.

Ques. What run have you been on?

Ans. From Henderson to Princeton, Evansville to Henderson.

Ques. How often did you go over this track at Harding Station?

Ans. Sometimes I went over it once, some times twice a day.

Ques. Were you over that track on the 6th day of May last?

Ans. Yes sir.

Ques. What time did you pass there?

Ans. That morning about 8 o'clock.

Ques. You passed there on the passenger train?

Ans. Yes sir.

Ques. Did you stop there that morning?

Ans. I do not remember.

Ques. What sort of a station is it?

209 Ans. It is only a small station, if we have any one to get on or off we stop, but unless we do we do not stop.

Ques. At what speed at that time did you pass that Station?

Ans. When we do not have to stop we run about 30 or 35 miles per hour.

Ques. What is the condition of the track between the two ends of the switch?

Ans. It was good. If there was any defect in the track when we go over it, it would give us a jar, and if it does we report the fact to the proper officers and they have it fixed.

Ques. Do you recollect anything about as to the condition of the weather when this wreck occurred?

Ans. I do not remember.

Ques. Can an engineer in passing over a defective track notice it; what is his position to know it?

Ans. We engineers keep close watch on the track all the time. If there was any defect in it we can easily find it.

Ques. If the track is out of shape is it *perceptible* to one riding on the engine?

Ans. Yes sir.

Ques. State whether you observed any sinking or giving of the track as you passed over it that day or at any time shortly before?

Ans. No sir, I did not see anything defective in it at all. Seemed to be as good as any other part of the track.

Ques. As engineer, did you have an opportunity to see how the track is ballasted between the ties?

210 Ans. Yes sir, we have a place where we can see the track all the time.

Ques. Do you recollect how the road was ballasted at that point?

Ans. Yes, it had dirt in the middle of the track. It was ballasted with dirt.

Ques. How high, if you are able to state, did it come up over the ties?

Ans. About one inch or a couple of inches over the ties.

Ques. Were you there after the wreck?

Ans. Yes sir, I was there the next morning.

Ques. What time the next morning?

Ans. Somewhere about 10 o'clock.

Ques. Did you go down there on the passenger train on the regular run?

Ans. Yes sir.

Ques. When you got there what cars were upon the track?

Ans. I do not remember now just how the cars stood at that time.

Ques. Did you observe whether any cars were standing on the track past the point where the mule was struck?

Ans. I have forgotten. I do not remember.

Ques. Did you observe that part of the track that was not torn up entirely by the wreck?

Ans. No, I paid very little attention to that.

Ques. You just went down on that train and came back?

Ans. Yes sir.

Ques. How long did you say you had been running as a locomotive engineer?

211 Ans. 18 or 19 years.

Ques. What would be the difference in striking stock with one of these short stubby pilots and striking with one of these long pilots?

Ans. I have hit cattle with both. There is not much difference.

Ques. Did you ever have the engine to raise with stock at points where the track was good?

Ans. Yes sir.

Ques. You say you have had engine wheels to run upon stock?
Ans. Yes sir.
Ques. What was the condition of the tracks upon such occasions?
Ans. On Hood's Creek. I struck a cow there where the track was in good condition.
Ques. What kind of a pilot did you have there, do you remember?
Ans. I do not remember.
Ques. Do you think there is a difference, if any, between the short pilot and the long pilot as to throwing cattle off the track?
Ans. I have hit stock with both; one is as good as the other, I do not see any difference.

By JOHN G. MILLER—Cross-examination of witness:

Ques. What is a pilot for?
Ans. The Pilot is supposed to throw any obstruction on the track off.
Ques. Now, did you tell this Jury that if the pilot stood up straight close and stubby, that it was just about as apt to throw stock off as it would if it sloped long?
212 Ans. What kind of a slope do you mean?
Ques. The long pilot extends out there in front of the engine, it is more sloping than the stubby pilot, is it not? It is longer in front, It is longer this way, it is not so stubby?
Ans. I do not understand the question.
Ques. The long pilot extends further out at the bottom than the stub pilot does it not; it is fastened on the engine at the same place?
Ans. Yes sir.
Ques. Then it is bound to be more sloping is it not?
Ans. Yes sir.
Ques. Then if it is more sloping it would be more apt to throw stock off the track, would it not?
Ans. Well, not any more so than the other pilot.
Ques. What is the use of having a slope to it then?
Ans. I do not know, I do not build them.
Ques. You say you struck a cow somewhere at Hood's creek between here and Princeton?
Ans. Yes sir.
Ques. Who was present?
Ans. I do not know who was on the train only Conductor Colmesneille.
Ques. Struck the same kind of track there that you had at Harding Station?
Ans. Yes sir.
Ques. Is it not a fact that if a cow is up on the ties or track, filled out good with the rails, that it is least apt to be hit and thrown down upon the track than if it was not ballasted, just state to the Jury there what is your opinion?
Ans. It would be just as apt to knock a cow off of either track.
213 Ques. Then it is just as likely to lift it up out of that low place as it would off the high one?

Ans. I should think so. When we lift stock we never notice how they are standing.

Ques. If a cow were laying down, would it be thrown off?

Ans. I have hit them laying down and have thrown them off the track.

Ques. You are more likely to run over one laying down than when standing up are you not?

Ans. Well, I can not say that you are.

Ques. If a train is going fast or slow, which is the most likely to knock a cow off the track?

Ans. Going fast.

Ques. You told this Jury that that track at Harding Station was covered between the rails across the top of the ties two inches thick with dirt?

Ans. About two inches, the dirt covered all the top of the ties in the center of the track.

Ques. Did you notice there that there was any such thing as the ties being muddy and working away from the dirt?

Ans. I never noticed that.

Ques. Did you ever notice any such thing as the train rocking at that point?

Ans. I never noticed that.

Ques. And there was no such thing as the ties being high enough for a man to put his foot under it?

Ans. I never saw anything of the kind there.

Ques. Well, if that had been a fact and the track had been drained and the end of the tie up off the ground at one end so that it would rock, would that be felt on the train?

Ans. I should not think it would.

214 Ques. Is it not more dangerous to strike an animal on a s-?

Ans. No, I do not think so.

Ques. Are you not in the employ of the Illinois Central Railroad?

Ans. Yes sir.

Ques. When asked if the long cow-catcher would not go under a cow when the short one might just knock it down; and you said that these short cow-catchers were so constructed as to throw things off the track as well as the long ones?

Ans. Yes sir. The only difference is that the long ones extend a little further out in front of the engine.

Plaintiff objected to above question and answer which was overruled, and exception reserved.

Ques. Is not the sloped pilot safer than the stub pilot?

Ans. No, I do not think it is.

Ques. Then, it is a fact that the shorter the pilot the safer it is?

Ans. I did not say that. I said the only difference between the two cow-catchers is that one is longer than the other, and the short one will throw stock off of the track as well as the other one.

Ques. How many times were you ever on a train when the train was wrecked by a cow?

Ans. I do not know.

Ques. Was that wreck there at Hood's Creek on the bridge or trustle or in a cow gap?
Ans. On a cow gap, yes sir.

J. A. SANDIFER introduced for the Defendant.

By H. D. ALLEN, Att'y for Defendants:

215 Ques. Where do you live?
Ans. Henderson, Kentucky.
Ques. Where were you residing in May, 1903?
Ans. Henderson, Kentucky.
Ques. You have lived in Henderson all your life?
Ans. Yes sir.
Ques. What is your occupation?
Ans. Engineer.
Ques. Railroad engineer?
Ans. Yes sir.
Ques. How long have you been employed as engineer?
Ans. 23 years.
Ques. For what Company?
Ans. The Illinois Central 15 years this coming May.
Ques. Did you ever run a freight train on the Illinois Central?
Ans. Yes, a little.
Ques. How long?
Ans. I do not know exactly how long. I only run extra on the freight.
Ques. How long have you been running a passenger engine?
Ans. Five or six years.
Ques. Between Evansville and Princeton?
Ans. Yes sir.
Ques. That passes by Harding Station?
Ans. Yes sir.
Ques. Were you on that run May, 1903?
Ans. Yes sir.
Ques. You remember the occasion of the wreck, do you?
216 Ans. Yes sir.
Ques. Did you go down there?
Ans. Yes sir, I got there about 8:30 that morning.
Ques. Are you very familiar with the track south of the public road at Harding Station?
Ans. Yes sir.
Ques. I will get you to tell the Jury what extent of notice you gave that track there?
Ans. I never gave it any particular notice, only as passing over it. We make it a rule to report the first time we get to a telegraph if we have found a bad place in the road, we telegraph "Bad place in track at such and such a place," that is the way we report the condition of the road.
Ques. What is your habit in regard to observing the road?
Ans. I notice it from the engine as we go over it.
Ques. What opportunity do you have for examining the road?

Ans. We always keep close watch on the road for any obstructions as we go over it.

Ques. Was there any obstruction between your position on the engine and the track?

Ans. No sir.

Ques. Well, Mr. Sandifer, I will get you to tell the Jury if you noticed any defect in that track, the part I have indicated?

Ans. No sir.

Ques. What condition was it in?

Ans. About on the ordinary with the rest of the track.

Ques. Explain to the Jury how your engine passed over that track there.

217 Ans. There was no rough places there.

Ques. Was there any waving of your engine up and down?

Ans. Not more than usual, any engine will rock.

Ques. What causes that Mr. Sandifer?

Ans. I could not tell unless it is the failure of the springs to equalize. When it strikes a curve sometime- it will rock.

Ques. There is a curve there at that place?

Ans. Yes sir.

Ques. You say you arrived at that wreck about 8:30 or 8 o'clock that morning?

Ans. Yes sir.

Ques. Please state to the Jury, Mr. Sandifer, your observation when you arrived at the wreck, and while you were there during that time?

Ans. I got there about 8:30 and we unloaded the passengers, and backed up to Grove Center to give the Wrecker a chance to pass us, and then we came back there again and transferred the passengers from the North bound train. While there I walked around the wreck, and saw where the mule was hit.

Ques. Where was that mule, the part you saw?

Ans. The head, neck, and shoulders was lying out at the end of the tie off on the road bed, on the left hand side of the road bed right out at the end of the ties.

Ques. On the ties or off the ties?

Ans. I think, kind of in between the ties.

Ques. About how far from the depot was that?

Ans. About 120 feet or 40 yards.

Ques. Did you see any more of that mule?

218 Ans. No sir.

Ques. Now, Mr. Sandifer, tell the Jury, there, what you saw with reference to the track being torn or misplaced?

Ans. Well, there were four cars standing on the track between where the mule was struck and the ties were all shoved away where the wreck was.

Ques. When you say the ties were all shoved away, what do you mean?

Ans. Right where the wreck was they were all piled up.

Ques. Beyond the switch north or south?

Ans. Beyond the switch point the wreck began, beyond the end of that switch point the ties were bunched up.

Ques. How far did that extend?

Ans. I do not know exactly, 15 or 20 feet or not so far.

Ques. How far was the engine, now, on beyond that?

Ans. I suppose 20 or 25 feet or maybe 15 feet, I can not tell exactly.

Ques. Did you notice the condition of the track this side of the end of the switch, I mean north?

Ans. Cars were standing on the end of the switch, I noticed marks of the wheels on the ends of the ties on the track there.

Ques. Did you notice where they began? About where did these marks begin?

Ans. About 120 feet from the Depot.

Ques. How far did they extend with reference to the switch?

Ans. The nearest I could give is that it is about 150 feet.

Ques. Did it not extend to the lead rail?

Ans. Yes sir.

219 Ques. What became of them there?

Ans. There the wheel struck the lead rail and threw the engine off to one side.

Ques. What do you mean by the lead rail?

Ans. The lead rail guides the cars. The trucks made the marks down on the ends of the ties and when it struck this lead rail it threw the engine right out to one side.

Ques. Is that the lead rail here?

Ans. No sir, that works with the switch point and is fastened to the other rail here.

Ques. Did you see the marks as it left the ties here?

Ans. Yes sir.

Ques. Mr. Sandifer, just state to the Jury the condition as far as you noticed it of the ties, the tracks, and that part of the road bed?

Ans. The cars were standing on this track, I think three or four, I am not so sure, I could not tell anything about the track under there at all. The marks on the track continued on down to this lead rail. I do not recollect anything about examining the track.

Ques. Did you notice any ties that were broken. What was the condition of the ties there?

Ans. They seemed to be solid.

Ques. Tell the Jury if you can, about how much weight there is upon a truck wheel of an engine?

Ans. 15 tons on that class of engine.

Ques. Where would that weight be?

Ans. It would be on the ties.

Ques. Did you observe north of the cars that were stand-

220 ing on the track, the condition of the track on back to where the mule was struck?

Ans. I did not go back any further than the cars.

Ques. Did you notice any sloshing or squashing up and down, or working up and down of the ties there?

Ans. No sir.

Ques. What would be the effect if that condition existed, Mr. Sandifer, and you were riding on the engine? Could you feel it on the engine? Could you feel it and see it on the engine were there any such conditions?

Ans. Yes sir.

Ques. I will get you to state now, as to the condition of it at that time?

Ans. I passed over there somewhere along about 6 o'clock the evening before and we were going at the rate of about 35 or 40 miles an hour and I never noticed anything whatever.

Ques. Just tell the Jury here whether you noticed where you say the derailment took place, whether you noticed if there were any ties misplaced?

Ans. Yes, I noticed some kind of bunched down about the culvert.

Ques. Did you observe the pilot on this engine?

Ans. No sir.

Ques. You did not know the kind of a pilot it was?

Ans. I could not say what kind of a pilot it was.

Ques. I will get you to state, Mr. Sandifer, if you have ever had any experience in knocking stock off the track, as engineer?

221 Ans. Yes sir, I have.

Ques. I will get you to tell the Jury, whether there is any difference with reference to the use of the standard pilot as this was, and the long pilot?

Ans. I have never seen any difference.

Ques. Have you knocked them off with both kinds?

Ans. Yes sir.

Ques. Well, now, I will get you to state what is your opinion with regard to the relative safety of the two pilots?

Ans. One is as safe as the other.

Ques. In your experience as an engineer, tell the Jury whether you have known an engine to be derailed by striking stock?

Plaintiff objected to question and answer. Plaintiff's objection sustained by Court. Exception made by Defendants.

Ques. Well, what is your experience, Mr. Sandifer, in the use of this pilot, in comparison with the other pilot in knocking stock off the track?

Ans. I have knocked them off the track with both. If you hit them in the right position they go off the track, if you hit them hard.

—— Miller, Att'y for Plaintiff:

Ques. Mr. Sandifer, you, I believe answered pretty clearly that the distance from this piece of mule was 120 feet south of the Depot?

Ans. Yes sir.

Ques. Estimating that this is about 400 yards between these two cattle guards, there would be about 150 yards from the Depot down to the south cattle-guard, would there not?

222 Ans. I suppose so.

Ques. As a matter of fact, that is about the distance, is it not?

Ans. I suppose so, I do not know.

Ques. Then the mule is supposed to have lain at this point, 120 feet south of this Platform?

Ans. As near as I could guess, yes.

Ques. That being true, how far would it be from this point here where the mule lay to the lead rail, from the mule to the lead rail?

Ans. About 150 feet.

Ques. How many cars stood on the track there where the mule lay?

Ans. Three or four.

Ques. A car is then 30 to 35 feet in length, is it not?

Ans. Yes, sir.

Ques. Now, I want to ask you how these cars were as to the cars that were off the track? Were they attached or not?

Ans. They were entirely torn loose.

Ques. Where did those that were off the track lay as regarding the cars that were on the track?

Ans. Three or four of these cars were south there bunched in a pile; south of this little culvert, and the engine lay over to this side.

Ques. Then you believe from the center of the guard rail there would be about 150 feet or 50 yards?

Ans. From there to where they were piled up, I supposed it to be about 120 feet. I was only guessing at it.

Ques. Supposing that to be 120 feet, is not that distance nearly three times the distance between these two?

Ans. I do not know.

223 Ques. Now, Mr. Sandifer, I will ask you if it is not just as far from that point of the lead rail there, from where this lead rail is; is it not just about the same distance to where the engine lay as it is back to where the mule lay?

Ans. The engine lay south of the culvert and outside with the head pointing over in this field. When it struck this lead rail it threw it clear off the rails to the left and tore the track up with it.

Ques. I want to know if the distance was not just about the same from the north point of that lead rail to where the engine lay, as it was back to where the mule lay?

Ans. *Well, I suppose the engine lay* 35 *or* 40 *yards south of that track.*

Ques. Would it not be nearly as far from here to the engine?

Ans. I suppose it would.

Ques. Now, you stated a moment ago that that engine struck the guard rail and the guard rail threw it to the left off the track?

Ans. Yes, sir, from that lead rail to where the engine lay is at least sixty yards.

Ques. Was that lead rail still there in-tact?

Ans. The track was all torn up.

Ques. Is it not a fact that the track was torn up there where these cars were standing?

Ans. No, sir, from about along just below the point of the switch the ties commenced to bunch.

Ques. Were there any bunches of ties up along the side of the track here?

Ans. No, sir.

Ques. The engine had gone south of the trustle across the cattle guard as was lying 30 or 40 feet to the left of the track
224 and 30 or 40 yards south of the cattle-guard?

Ans. I do not know exactly how many feet away the engine was, but I suppose it was that far.

Ques. You say the engine did not leave the track until she got down here?

Ans. Yes, sir.

Ques. What direction, what course, did the engine take from this point here to where the engine lay with her nose in the field up here?

Ans. She took to the left.

Ques. If the engine took to the left up here, you say the track was swept up from there on?

Ans. Yes, sir.

Ques. You say the engine left the track here south of the cattle-guard?

Ans. It left it there at the lead rail.

Ques. Was it across that stream?

Ans. I was not there.

Ques. You could have seen, could you not?

Ans. I do not see how you could see with the engine and a big pile of cars piled up there.

Ques. I want to ask you if that engine had gone in that —, would it not have left some mark?

Ans. I do not understand the question.

Ques. If there were 2/5 or ½ or a majority of the ties along there in that track from that culvert north to where the mule was struck, if the majority of them were rotten, and no ballast between the ties and the ties had sunk down into the dirt, and during the
225 winter was soft and had worked the dirt away from them until a man could put his hand down between the dirt and the ties in the center of the track so the ties worked up and down?

Ans. I did not say it was in that condition.

Ques. Now I want to ask you something about that place there; I want to ask you if that is not the place where the bridge or cattle guard was?

Ans. Yes, sir.

Ques. Is it not a fact that you have seen a number of cattle at this place repeatedly?

Defendant objected to question and answer. Defendant's objection sustained by the Court and exception made by Plaintiff.

Ques. Have you frequently seen cattle there?

Ans. I have seen cattle there often, I have killed cattle there.

Ques. Your only opportunity of observing that track was passing there on the trains?

Ans. Yes, sir.

Ques. How long prior to the time of this wreck had you stopped your passenger train at Harding Station?

Ans. I could not say exactly.

Ques. Did you stop there every time you would pass?

Ans. No, sir, we only stopped there when we had a passenger to get on or off, I frequently go south on 321.

Ques. What sort of ballast was there on that track at that place?

Ans. Dirt.

Ques. How high up did it come on the ties?

Ans. About two inches, it covered the ties about two inches in the center.

226 By H. D. ALLEN, Att'y for Defendant:

Ques. Did such condition as has been stated as to the track jumping up and down, did such condition exist there?

Ans. No sir, it did not.

Ques. Does that switch rail point so that the cars can run off of the main track on to the switch?

Ans. The switch rail points here and comes up next to the main rail, and works with the switch.

Ques. Now, I will ask you if the truck wheel in striking here, where would it go?

Ans. It would go out to one side. The main lead rail is stationary.

Ques. Would not that truck as a matter of supposition get below that rail by pushing over here and the right hand wheel of the trucks continue along the tracks?

Ans. Yes sir.

By JOHN C. MILLER, Att'y for Plaintiff:

Ques. Have you ever killed stock right there with your engine?

Defendants objected to question and answer. Defendants' objection over-ruled and exception made by Defendants to the Court's ruling.

Ans. I have killed stock there, yes sir.

Ques. How long before the time of this wreck?

Ans. It may have been a year before that.

Ques. And what was the condition of that road there then?

Ans. Every thing was in the same condition there when I killed the stock as it was at the time of this wreck.

By H. D. ALLEN, Att'y for Defendants:

227 Ques. How did you kill this stock; was it unavoidable?

Ans. Yes sir.

Ques. Did they run upon the track?

Plaintiff objected to question as being incompetent and sustained by the Court, and Defendants excepted.

Ques. You say it was an unavoidable killing?

Ans. Yes sir.

Mr. G. E. SEIBERT introduced for defense.

By H. D. ALLEN, Att'y for Defendants:

Ques. Where do you live?
Ans. Evansville, Indiana.
Ques. In what business are you engaged?
Ans. As a locomotive Engineer.
Ques. On what road?
Ans. The Illinois Central.
Ques. Between what points do you run?
Ans. Evansville and Princeton.
Ques. How long have you been engaged in that business?
Ans. About 17 years.
Ques. All the time as Engineer?
Ans. I have been an engineer about 12 or 13 years.
Ques. Were you running there the 7th day of May, 1903?
Ans. Yes sir.
Ques. When had you been over the track there at Harding Station?
Ans. The morning before, going South.
Ques. The morning of the 6th day of May?
Ans. Yes sir.
Ques. What sort of train were you running?
228 Ans. Local freight.
Ques. What are the responsibilities and powers of an engineer and conductor of a freight train with respect to running trains?
Ans. We are supposed to run the train with our best judgment as to safety. The engineers are supposrd to run the train as the conductor says as long as there is nothing out of the ordinary or unsafe.
Ques. From whom do you take your orders for running the train?
Ans. Chief Dispatcher.
Ques. From whom does the Conductor get his Orders?
Ans. Chief Dispatcher.
Ques. Who is responsible for the safety of the train?
Ans. The conductor and engineer.
Ques. Are the conductor and engineer equally responsible?
Ans. Yes sir.
Ques. If the Conductor gives you an order that you think is unsafe, you then have to go upon your judgment as to its fulfillment?
Ans. Yes sir.
Ques. What was the condition of that track on the morning of the 6th? Was that a safe track?
Ans. Yes, as near as I know.
Ques. Do you recollect whether the road was dry at that time or not?
Ans. I do not remember.
Ques. To the South of the Platform there is the road bed on a level, in a cut or on a fill?

Ans. There is a little fill there.

229 Ques. State whether or not an engine running over a road bed, whether you can detect any defects in the track?

Ans. Yes sir, if there is anything unusual in the track you can feel a jar on the engine, it rocks.

Ques. What speed had you gone over that track on the morning of the 6th when you had gone over there prior to the wreck?

Ans. I am not for sure, but we may have gone about 25 or 30 miles an hour.

Ques. Is that a dangerous speed?

Ans. No sir.

Ques. Did you feel any jar of your engine anywhere along there?

Ans. I do not remember about that.

Ques. Was you there at the wreck or any time soon after?

Ans. Only to slow along and pass there, I did not stop.

Ques. Did you go back there before the track was clear.

Ans. The track was clear and everything was clear there so I could pass over, we had to slow up very slow to pass there.

Ques. Did you examine the condition of the track there north of the switch rail after the wreck?

Ans. No sir. It was in the night when I passed there, and I could not observe anything only a bulk of what was lying around there.

Ques. Then, some witnesses who have spoken of the track being so wet and the ties working up and down, and had worked the dirt away from the ties, and trains would rock when passing over. Was there any such condition of that kind there when you went over it?

230 Objected to by Plaintiff and over-ruled by the Court to which ruling Exception was made.

Ans. I do not remember at that time of there being anything of that kind there.

Ques. Did you know this engine that Mr. Sheegog was driving, No. 282?

Ans. Yes sir.

Ques. Did you ever use this engine?

Ans. Yes sir, I took it to the shop the day before.

Ques. What was the condition of the engine?

Ans. Everything was in good condition so far as I could see, except a muddy boiler.

Ques. What was the condition of the pilot?

Ans. Good condition.

Ques. How high was that pilot?

Ans. About 4½ inches.

Ques. What kind of a pilot was it?

Ans. It was a standard pilot used by the Illinois Central Railroad at that time and now.

Ques. What was the safety of that pilot, state whether it is a safe pilot or not?

Ans. I think it is safe.

Ques. Now, in regard to a longer pilot, the end sticks out further in advance of the engine does it?

Ans. Yes sir.
Ques. Did you ever use one of these pilots?
Ans. Yes sir.
Ques. Is there any difference in the safety of them?
Ans. No sir.
Ques. What is the effect of this pilot knocking obstruc-
231 tions from the track?
Ans. It will knock everything out of the way except maybe a small shoat, or something of that kind.
Ques. About how much is the slope of that pilot?
Ans. I am not in a position to say that.
Ques. Do you know how long a pilot is from the highest point where it is attached to the engine down to the lowest point out in front?
Ans. I do not. The pilots are made as long as they can be made at the present time and using the proper equipment and state law equipments.
Ques. Was that the condition at the time of the wreck in May, 1903?
Ans. Yes sir.
Ques. You say you have had considerable experience as an engineer; if the pony trucks of an engine got off and run some 150 feet across the ties then struck the lead rails of the switch, what would likely be the effect of that?
Ans. It would pretty likely throw the engine off.
Ques. Will an engine with 15 cars going at, say 20 miles an hour, if you go off the track, what would be the effect on the track?
Ans. Unless the track was in a good sound condition it would be pretty apt to tear it up.
Ques. If it was in good sound condition, what would it do?
Ans. It might scar it up a little; the weight of the flanges would bear down into the ties.
Ques. What effect would it have if the cow-catcher got down and struck anything?
232 Ans. It would break it off.
Ques. Did you notice the cars while they were wrecked, before they were taken out?
Ans. No sir, I was not there.

Cross-examination by —— MILLER, Att'y for Plaintiff:

Ques. You were asked if the pilot that you referred to as being used by the Illinois Central was more dangerous or more likely to cause an animal to go under it than the other; and you answered "not that I know of." What is your opinion as to the accident?
Ans. I have no opinion to form there.
Ques. Mr. Seibert, this pilot that you call the standard pilot, you say it is the standard pilot for the Illinois Central?
Ans. Yes sir.
Ques. You do not pretend to say that it is the standard pilot used on all engines, do you? And the Locomotive Brotherhood of Engineers do not object to this kind of pilot?

Defendants objected to question and answer. Objection sustained by the Court and exception made.

Ques. I will ask you if it is not true that the employés of the road leading from Henderson on the Louisville, Henderson, and St. Louis Railroad did not raise an objection to that pilot and require a different pilot to be used?

Defendants objected to question and answer. Court sustains defendants' objection and exception made.

Ques. As a matter of fact is this the same pilot used on this same road?

Defendants objected to question. Court sustains defend-
233 ants' objection and Plaintiff excepted.

Ques. Did you ever run on this Louisville, Henderson & St. Louis Railroad, were you ever in the employ of that Company?

Ans. No sir.

Ques. Now you said that these pilots were as long as they could be made under the state law equipment; what state law equipment do you refer to?

Ans. To the Automatic Couplers.

Ques. The Automatic coupler is a coupler that couples itself is it not?

Ans. Yes sir.

Defendants objected to the above questions pertaining to the State law equipment, which objection was over-ruled by the Court, exception reserved.

Mr. PHIL DRENNON introduced.

H. D. ALLEN, Att'y for Defendant:

Ques. Where do you live?

Ans. Princeton, Kentucky.

Ques. Are you in the employ of the Illinois Central Railroad?

Ans. Yes sir.

Ques. As Engineer?

Ans. Yes sir.

Ques. How long have you been in the employment of that Company?

Ans. About 23 years.

Ques. How long have you been running an engine?

Ans. Ever since '90.

234 Ques. Where are you now and how long have you been there?

Ans. I have been five years between Princeton and Hopkinsville.

Ques. What kind of a train do you run?

Ans. Passenger train two ways a day and a mixed train two ways.

Ques. Did you know Mr. John E. Sheegog?

Ans. Yes, just when I saw him.

Ques. When did you last see him?

Ans. On the evening before he went north?

Ques. Did you see the engine that he was driving?
Ans. Yes sir.
Ques. Did you know the number of it?
Ans. Yes sir.
Ques. What was the number?
Ans. 282.
Ques. What was the condition of that engine?
Ans. The engine was in first class condition.
Ques. What about the pilot?
Ans. New pilot.
Ques. What do you mean?
Ans. It had just been put on.
Ques. Had you run this engine?
Ans. Yes sir, for five months before.
Ques. What was the condition then?
Ans. Good.
Ques. How long had he run it?
Ans. Just from Henderson to Harding.
Ques. You say it was a good engine?
235 Ans. Yes sir.
Ques. What is the difference in value of the cow catchers or pilots used by the Illinois Central Railroad?
Ans. We regard one as good as the other.
Ques. Was that a standard pilot?
Ans. Yes sir.
Ques. Have you had any experience in striking stock with that Pilot?
Ans. I have.
Ques. What was the result thereof?
Ans. Knocked them off.
Ques. About what was the heighth of the pilot from the Rail?
Ans. 4 inches.
Ques. You were not at this wreck were you?
Ans. No sir.
Ques. Did not know anything about it?
Ans. No sir.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. How long before the wreck was it that you had used this engine?
Ans. The day before.

A. MURPHY introduced for defendants.

By H. D. ALLEN, Att'y for Defendants:

Ques. Mr. Murphy, where do you now reside?
Ans. Central City, Kentucky.
Ques. How long have you been there?
Ans. About two years next month.
Ques. In whose employ are you there?

Ans. I am in the employ of the Illinois Central Railroad
236 Company?

Ques. In what capacity?

Ans. As Supervisor of Railroad tracks.

Ques. How long have you been engaged in that kind of employment?

Ans. About three years.

Ques. Were you ever employed by the Illinois Central Railroad Company on this Evansville division of its tracks.

Ans. Yes sir, I was here from September 1902 up until April 1903.

Ques. What position did you occupy then?

Ans. Supervisor of tracks.

Ques. Are you familiar with the track there at Harding Station.

Ans. Yes sir.

Ques. Mr. Murphy, I will ask you if you ever had occasion to examine that track before you left here or before this wreckage occurred?

Plaintiff objected to question and answer. Objection of Plaintiff over-ruled by Court and Exception made by Plaintiff.

Ans. Yes sir.

Ques. How long before this wreck occurred?

Ans. It must have been in the course of a month before the wreck?

Ques. Had you examined it then about a month before you left here?

Ans. Yes sir.

Ques. What was the condition of the track at that time?

Ans. It was in safe condition.

237 Ques. Well, I will get you to describe the condition that existed there at that time?

Ans. The ties were ballasted with what is known as dirt ballast; the ties are tamped to the surface, and are supposed to be about 10 or 11 inches apart, that is between them and the space in the center of the track is filled up to about 2½ or 3 inches, then it slopes off on top in under the rail down to the end of the ties to nothing so as to give water a chance to drain off. Out side of the rail there is no fill, if there were a fill there the water would accumulate there.

Ques. To what extent was the track ballasted?

Ans. It was ballasted firmly.

Ques. How high did that ballast reach from the center of the track?

Ans. From 2½ to 3 inches above the tie, and then sloped out to the end of the rail.

Ques. I will ask you as to the soundness of the ties?

Ans. The ties were in good condition.

Ques. Do you know the curve there, Mr. Murphy, what is that curve?

Ans. It is between 3 and 4 degrees, I think.

Ques. In your opinion was not that track reasonably safe for running trains over it?

Plaintiff objected because leading. Court refused to permit witness to answer the question to which ruling of the Court the Defendants excepted. Defendants made avowal that witness would say the track was reasonably safe for the operation of trains.

238 Ques. Now about the drainage there from that track, Mr. Murphy? Did you know about that?

Ans. Yes sir. The drainage from the platform south starts out about 18 inches to two feet, that is between the depot and the cattle guard what is known as the culvert or bridge, to two feet to the culvert.

Ques. Now, I will ask you if at that place that track gave you any trouble while you were Supervisor of the Tracks?

Ans. Gentlemen, it never did give me a bit of trouble before the wreck occurred.

Plaintiff objected to answer, Court over-ruled said objection to which an exception was made by Plaintiff.

Ques. You did not see the wreck?

Ans. No sir.

Ques. You were not there after it occurred?

Ans. No sir.

Ques. I will ask you, Mr. Murphy, in regard to the switch rails here. Just tell the Jury in your opinion how a wreck would occur presuming that the trucks had jumped off the track here to the left, running on the ties on the left side on the outside, and on the inside of the right rail?

Plaintiff objected to question and answer. Plaintiff's objection sustained and Defendants excepted. Defendants made avowal that witness would say that when trucks left the ties the truck would drop on that side and the axle would drag, thereby pushing all the ties before it.

Ques. Mr. Murphy, just describe to the Jury the construction of that switch there and that lead rail? Just look at this map and describe it?

Ans. I do not know this map. I have never been on the ground since the wreck only to pass over it Saturday afternoon.

239 Ques. Just tell the Jury how that switch is constructed there and what the lead rail is?

Ans. The switch has what is known as a switch frog. A switch is a track leading out from the main. It has a construction of what is known as two switch points. And what is known as the lead rail is a rail that leads out from the outside of the track over to the frog of the switch; it is known as the turn out. And this lead rail that forms the turn out, from the switch point it is not spiked down it is worked with what is known as a — some set 5½ and some 6 inches, they were 6 at Harding Station.

Ques. You say they were six inches previous to the wreck?

Ans. I said they always were 5½ or 6 inches.

Ques. Then, that switch down where it is over up next to what is known as the traffic rail; joins the main track, when the outer switch rail is over next to the other rail, than, that forms a turn out?

Ans. Yes, that rail is stationary over 15 feet. — That track is stationary back to the frog, a distance from there at the point of the frog to the end of this rail, of 67 feet ——

Ques. Where the derailment occurred back to where the witnesses said the mule was, where it threw the pony truck outside of the traffic rail. Estimating, Mr. Murphy, that 150 feet north of that switch where the pony trucks had left the railroad track to the left going south, and had run along on the ties, then what would be the effect when that inside truck wheel reached the lead rail.

240 Plaintiff objected to question and answer. Objection of Plaintiff over-ruled, and exception made by Plaintiff.

Ans. When it come in contact with that lead rail, gentlemen, it would crowd it the further you go, particularly towards the other end of the switch, then it would drop off the end of the ties, and the wheels would go down in the dirt, and the truck dropping in between the ties would cause everything to be swept with them.

Ques. Estimating that the engine run along; the truck wheels run along on the ties, and estimating that the side truck wheel, when it reached this lead rail turned the engine to the left, what would be the effect with regard to wreckage or destroying the track when the bridge or culvert was reached by that engine?

Plaintiff objected to the question and answer. Plaintiff's objection over-ruled by the Court and exception made.

Ans. It is just as I said, gentlemen, when those trucks leave the ends of the ties, there is nothing to stop the train from cutting the ends of these ties, and taking everything right ahead of it, catching the ties all the way along.

Ques. I believe you said you were Supervisor for about seven months, from September, 1902 until April, 1903?

Ans. Yes sir.

Cross-examination by —— MILLER, Att'y for Plaintiff:

Ques. Where were you living at the time of this accident, Mr. Murphy?

Ans. Central City, Kentucky.

Ques. Where were you living during the time you had charge of this track?

241 Ans. My family was living in Henderson, and my headquarters were at Princeton.

Ques. How much track did you have charge of?

Ans. I had from Evansville to Hopkinsville, and from Blackford to Dixon, and from Morganfield to Uniontown. I forget the number of miles.

Ques. That would be about two hundred miles, would it not?

Ans. Well, yes, I suppose so.

Ques. What was your special attention to Harding in March, 1903?

Ans. I gave no special attention there, no more than my regular duty.

Ques. How did you happen to be there at that time? What interested you?

Ans. I went over that track on the evening before I left here. The assistant Superintendent was with me. I did not know anything about my having been transferred from here to the main line, until Mr. —— received an order to send me to Central City on No. 104; I told him that I could not possibly go then, that I had to go home. Then I come back that night on No. 54, and the last I saw this track was going down on this evening train?

Ques. You were then on the passenger train? And you were not off on the ground there then?

Ans. Yes, I was on the passenger, but I was not on the ground, I did not get off the train.

Ques. What time of the night was it when the train passed this place?

Ans. The train was on time.

Ques. You spoke of going over that track and spoke about its condition; when were you there, when was that time?

242 Ans. I said I had not seen the track for about a month before that wreck.

COURT:

Ques. Please state, Mr. Murphy, about the last time that you inspected the track at that point?

Ans. It was probably about three or four days before I left.

By —— MILLER, Att'y for Plaintiff.

Ques. How did you inspect it then?

Ans. From the train.

Ques. You were on the passenger train?

Ans. Yes, sir.

Ques. Do you remember whether this passenger train stopped at Harding or not?

Ans. No, sir, I do not remember.

Ques. How long before where this wreck occurred, were you on that track at what time?

Ans. I do not remember. I could not say as to the day I walked over it.

Ques. Mr. Murphy, if this track here is the main track, and this is the siding at Harding, now then, the train coming along on the rails and everything in order, so as to pass that lead rail there; how does it pass there; is it not a fact that that lead rail stands off to let the wheel pass on on the main rail, and that the flange of the wheel is on the side of the rail?

Ans. Yes, sir.

Ques. What is the reason the flange does not follow off this way?

243 Ans. Well, in that case the main rail answers as a guard rail.

Ques. Is not the lead rail set out so that the flange of the wheel may pass in between the main rail and the lead rail?

Ans. Yes, sir.
Ques. And on the side is what is known as the left hand —?
Ans. Yes, on the left hand side.
Ques. Well, this is the switch up here, and this is the lead rail here, that comes up to this point here?
Ans. Yes, and joins the track.
Ques. And that leaves a space for the flange of this wheel to come in?
Ans. Yes, sir.
Ques. How wide is that space?
Ans. About two inches.

Mr. J. McNamara introduced for the defendant.

H. D. Allen:

Ques. Where do you live?
Ans. Princeton, Ky.
Ques. What position do you occupy?
Ans. Track Supervisor.
Ques. Of what District?
Ans. Of the Paducah District.
Ques. Do you remember about the time of this wreck at Harding Station?
Ans. Yes, sir.
Ques. Were you there after it occurred?
Ans. Yes, sir.
Ques. How soon after?
244 Ans. I got there about 9 o'clock in the morning after the wreck.
Ques. Well, I will get you to tell the Jury as fully as you can the condition you found there, just describe what you saw there?
Ans. I found that the train had wrecked there. I found that the engine had run over a mule, and derailed the pony trucks and the engine had run on down to the lead rail about 150 feet, that lifted the engine off the track, and there it caught the ties and rails in the front of the wheels and just pushed the track right on down for about 180 feet below. There were seven cars all in a pile, and there was four cars standing back where the pony trucks left the track. The back car had one pair of trucks off the rails.
Ques. You say there were four cars standing back where it struck the track, how close did they reach to the switch?
Ans. The back car was off the track, the trucks were off on the end of the track where it was torn up.
Ques. What was the condition of that mule.
Ans. The mule's head and forepart was laying outside on the end of the ties.
Ques. How far out?
Ans. About 24 inches from the rail.
Ques. On which side?
Ans. On the east side of the track.
Ques. Did you observe any of the balance of that mule?
Ans. Yes, sir.

Ques. Where was that?

Ans. In this bridge, or rather where the bridge was but
245 it was knocked out of there.

Ques. You say there was no bridge there?

Ans. Not at that time.

Ques. Did you notice the condition of the railroad bed up to where the lead rails took the cars off?

Ans. The track was in good condition.

Ques. Describe it to the Jury?

Ans. The track was ballasted with dirt ballast extending about two inches over the top of the ties in the center of the track with a slope out towards the ends of the ties.

Ques. How was the drainage there from the track?

Ans. It was good, very good, the ground was dry there on that day.

Ques. Did you notice any loose ties there or misplaced ties where the track was intact?

Ans. I think there was only one or two where the trucks were shoved along, out of place.

Ques. What was the condition of these two ties?

Ans. The ends were broken off.

Ques. What is the effect; how would a derailment occur there if a train struck a mule or any other obstruction on that curve?

Plaintiff's objection sustained by the Court.

Ques. Well, I will ask you this question, assuming that stock would be struck there and part of it go under the train having a tendency to elevate it, then what would be the result as to its leaving the track?

Ans. It would be apt to derail the pony trucks on the
246 side of the curve.

Ques. Well, could you not tell the Jury how the road is constructed on a curve, which rail is the higher?

Ans. The outer rail is elevated according to the degree of the curve. The elevation was about 2½ inches there.

Ques. Did you notice any sloshes on the track where the mud had been sloshed up on the ties?

Ans. No, sir.

Ques. Did you notice any condition where the ballast did not reach up to the top of the ties?

Ans. Right adjoining the switch ties it was up to the top of the ties but not on top.

Ques. Back where the mule was struck, did you make any examination there?

Ans. I did.

Ques. State to the Jury whether or not you noticed that road bed close at that time?

Ans. Yes, sir, I did.

Ques. You stated that you had seen that road bed later at that point; when was that?

Ans. This morning.

Ques. Did you make any examination of the ties at the point where the mule was struck on to the switch.

Ans. Yes, sir.

Ques. Just tell the Jury the condition and the *number* of these ties that are there now?

Plaintiff objected to question and answer. Court sustained Plaintiff's objection, defendant excepted, and avowal made by Defendant's Counsel that witness would state that all of ties between
247 the point where the mule was struck and the lead rail are yet there in use as they were except fourteen.

Ques. Please state to the Jury if you have not, within the last few days, made an examination of this road bed, and the ties from the point where the mule was struck to the switch?

Ans. Yes, sir.

Ques. Now, please state if after your examination was made, you were able to identify any ties that were in the road bed at that point at the time of the wreck, and if so how you identified them and how many there were?

Ans. I identified them by the marks on the ties. There was 9/10 of the ties there with the marks on them?

Ques. That you identified?

Ans. Yes, sir.

Ques. What were those marks?

Ans. Marks of the pony trucks.

Ques. Do you know Mr. Summers?

Ans. Yes, sir.

Ques. What position did you occupy when he was in the employ of the road?

Ans. Supervisor of tracks.

Ques. How long were you Supervisor?

Ans. Seven years.

Ques. When did your employment as Supervisor on this road cease?

Ans. April, 1903.

Ques. That was the year before the wreck?

Ans. Yes, sir.

248 Ques. I will get you to state to the Jury the condition of the road bed at that place from the public road at Harding Station down to the bridge or culvert just south of the Station at that time?

Ans. The condition was good.

Ques. State its condition with reference to being dry or wet?

Ans. Dry.

Ques. You saw the drainage there?

Ans. It was good. On an embankment.

Ques. State whether or not the track was at that time in a reasonably safe condition for the operation of trains?

Plaintiff objected to question and answer, which objection was sustained by the Court to which ruling of the Court the defendants excepted, and made avowal that witness if permitted to answer would

say that the track was then in a reasonably safe condition for the operation of trains.

Ques. You say you know Mr. Summers?

Ans. Yes sir.

Ques. He stated yesterday that he was present and that he heard Mr. Brannon ask you, as Supervisor of Track, for ballast and cinders to put upon that road there. Please state if he made any such request of you?

Plaintiff objected to question. Objection of Plaintiff over-ruled, and exception made by Plaintiff.

Ans. No sir, while Mr. Brannon was on the section he had more material than he could handle.

Ques. What kind of material.

Ans. Gravel.

249 Ques. You say he made no request of you for anything of the kind?

Ans. No sir.

Ques. Did he make any request of you for material of any kind that was not furnished?

Ans. No sir.

Ques. Did he make these frequent requests of you?

Ans. No sir.

Cross-examination by JOHN G. MILLER, Att'y for Plaintiff:

Ques. At this place where the main track is joined by the side track that is at the switch, the ties are long ties, going clear across the two tracks; they are what is known as switch ties are they not?

Ans. Yes they cross both tracks, the rails opposite the switch lay on the same ties.

Ques. This contrivance that is called a track, has a piece of iron the end of which curves out, has it not?

Ans. Yes sir.

Ques. That is to bring the rails in to that narrow passage to lead into the right place?

Ans. Yes sir.

Ques. How wide is that space between the end of the track iron there at the curve between that and the rail?

Ans. Between the curve, 1⅞ inches between that and the main rail.

Ques. Is not that — two inches?

Ans. Yes sir.

Ques. What is the space between the middle of the iron

250 and that main rail?

Ans. 1⅞ inches.

Ques. Now, then, the — of the track curves away from the rail and how far is it from the point, the extreme point of the — of the track to the main rail?

Ans. Eight inches.

Ques. Now, in identifying these ties that are now in the track

with the ties that were there at the time of the wreck, how did you do so?

Ans. By the marks of the pony trucks.

Ques. The marks the pony trucks made on them?

Ans. Yes sir.

Ques. You say that we may go there and find 9/10 of the ties so marked with the pony trucks?

Ans. Yes sir.

Mr. STROTHER BANKS introduced for the defendant.

By JOHN W. LOCKETT, Att'y for Defendants.

Ques. Where do you live, Mr. Banks?

Ans. Henderson, Kentucky.

Ques. What is your occupation?

Ans. I am Trust Officer of Union Bank & Trust Company.

Ques. What was your occupation in the fall of 1903?

Ans. I was an Attorney.

Ques. Mr. Banks, I will ask you if, at the instance of an Attorney of the Illinois Central Railroad, you visited Harding Station in the fall of 1903?

Ans. Yes, I did.

Ques. Did you examine the ties at the point just south of the Station platform, down to the end of the switch?

251 Ans. Yes sir.

Ques. Tell the Jury if they had any marks upon them, if so describe them?

Ans. There were marks on the ties, made where the train, I presume, left the track.

Ques. Beginning at the Station Platform and going South or west, as you choose from here, how far was it from the platform to where you observed these ties marked?

Ans. I think it was not over 60 yards; I do not know that I could give you a plain answer with my idea at distance.

Ques. How far was it from the platform in the direction of the Culvert or cattle guard down there?

Ans. I do not know.

Ques. Was it half way, or 2/3 or the ties?

Ans. I do not remember.

Ques. Was there 90 or 110 ties?

Ans. I do not remember.

Ques. How far from there on the *the* cattle-guard?

Ans. That was a less distance from where the wheels went off to the cattle guard than from the Station to where the wheels went off.

Ques. From the marks close to the rail to the cattle guard, was a shorter distance, than from the station to these marks?

Ans. Yes sir.

Mr. J. W. PIKE introduced for the defendant.

By H. D. ALLEN, Att'y for Defendants.

Ques. Where do you live?

Ans. Morganfield, Kentucky.

252 Ques. You have had charge of this section here, I believe, on the Illinois Central Railroad?

Ans. Yes sir.

Ques. Do you remember the time of the *time of the* wreck at Harding Station?

Ans. Yes sir.

Ques. Were you there after it occurred, if so, how soon after?

Ans. About 6 or between 6 and 6:30 after it occurred.

Ques. Just state to the Jury there if you saw the mule?

Ans. Yes sir, I saw a part of the mule about 40 yards from the Depot.

Ques. You say you saw a part of the mule about 40 yards from the Depot?

Ans. Yes sir.

Ques. What part of it did you see?

Ans. The head, neck and shoulders.

Ques. Where was it laying?

Ans. On the high side of the curve.

Ques. Did you see any of the balance of the mule?

Ans. No sir.

Ques. About how far from that was the ditch or culvert?

Ans. 180 feet.

Ques. What is the condition of the track on the other *was*, and how far from the culvert was the engine?

Ans. About 100 feet, I suppose, the engine was from the switch point, from the heel of the switch point down opposite to where the engine lay.

Ques. What was the condition of the track there between these two points?

253 Ans. Here it was torn up. It was swept all off.

Ques. What become of the culvert?

Ans. It was carried away.

Ques. Now, then, Mr. Pike, did you notice any cars standing on the track this side of the switch, that is north of the switch?

Ans. Yes, there was three or four standing between the frog of the switch and where the mule was cut in two when I got there.

Ques. How long were you at that wreck?

Ans. I was there until the wreck was cleared up, some time in the next night.

Ques. State to the jury, the condition of the track between the switch heel and where the mule was struck?

Ans. It seemed all right, cars were standing on it, I could not tell, it only had marks of the wheel along on the ends of the ties; and one or two ties were slipped a little from their place, I believe; that is, from where the mule was struck to the heel of the switch.

The condition of the rails seemed to be all right, they were in the right place, cars were standing on them, 2 or 3; 3 or 4.

Ques. What was the condition of the ground, was it wet or dry?

Ans. I never noticed any wet places. It was a tolerably dry time of the year and the track has no very good shade.

Ques. Now, you do not work that section do you?

Ans. No sir.

Ques. I will get you to tell the Jury if you noticed the condition of the dirt ballast between the ties.

254 Ans. Why, it was filled about 2½ inches or maybe 3 inches above the top of the ties in the center and then it sloped out and run under each rail to the bottom of the ties on the outside.

Ques. Have you been there recently?

Ans. I was there this morning.

Ques. I will get you to tell the Jury, if you made an examination of these ties, and if so, to what extent, and if any ties remain there now that were there when you examined the wreck?

Ans. Yes sir. There was only 38 ties that was marked, that was all.

Ques. How many ties were there from the point where the mule was struck down to where the wreckage occurred?

Ans. Where the wheel dropped off there was 52 track ties to the switch ties, and the 52 switch ties that still remained in the track there was marked. There was two switch ties taken out that was torn up so. That is between the heel of the switch and that point.

Ques. How many ties were there here? I mean track ties from the point where the mule was struck down to the switch ties?

Ans. 52.

Ques. How many of these ties did you identify as being there now that were there at the time of the wreck? How did you identify them?

Ans. By the marks of the wheel.

Ques. Explain what you mean to the Jury?

Ans. Wheel had run along on the ties on the out side of one rail and on the inside of the other rail.

Ques. Were the switch ties on beyond that torn up?

255 Ans. No, they were not torn up, only two were broken and displaced.

Ques. How many of the switch ties that are there now that was there then?

Ans. 52.

Ques. How many are there now?

Ans. 54.

Ques. How many that have the marks on them?

Ans. 52.

Cross-examination by P. B. MILLER, Att'y for Plaintiff:

Ques. I do not believe that you have worked on that section any?

Ans. No sir.

Ques. Mr. Pike, you at that time were working on the section here at Morganfield for the Illinois Central Railroad Company?

Ans. Yes sir.

Ques. You are working here now, are you?
Ans. Yes sir.
Q. Are you a native of this County?
Ans. No sir.
Ques. How long have you lived here?
Ans. I have been here since the 7th day of August, 1902.
Ques. Where did you came from?
Ans. Robinson County, Tennessee; about 21 miles south of the City of Nashville.
Ques. And you went to work on the section here?
Ans. I went to work as a section hand.
256 Ques. When did you take charge as section foreman?
Ans. I went to work on the 7th day of August, 1902 and took charge the 28th day of June, the following year?
Ques. You went down to the wreck on the morning of the wreck?
Ans. Yes, I got there between 6 and 6:30.
Ques. Were these three or four cars still standing on the track when you got there?
Ans. Yes sir.
Ques. The furthest car south was off the rail, was it not?
Ans. From the end it was. It was run off there where the rails had been torn up.
Ques. It was a matter of fact that the wheels were off the track, if the track was torn up right at the heel of the switch point was it not?
Ans. Yes sir.
Ques. The south wheels of that car were off the track were they not?
Ans. Yes sir.
Ques. The track then was torn up at that point?
Ans. No sir, there were three cars standing there.
Ques. Was one of these the Caboose?
Ans. No sir.
Ques. Where was the Caboose?
Ans. It was on the siding, I think. It was probably taken back to Morganfield, either there or on the siding I do not know which.
Ques. Do you mean to say that a part of these cars had been taken off the main track?
Ans. Yes, they had to wait for the wrecker to put that car
257 on the track.
Ques. How far back north of the north end of these cars had the mule been struck?
Ans. I could not say; I never measured it.
Ques. Were these cars standing right by the side of where the half of mule was laying?
Ans. I do not remember just exactly what position they were standing in. I know I walked around three or four cars when I got there.
Ques. What I want to know is this, how far from where this one-half of the mule lay between the ends of the ties was it to the north end of these three cars that were standing there?

Ans. Somewhere in the neighborhood of 180 feet.
Ques. You then say it was 180 feet.
Ans. Something like 180 feet.
Ques. From where a part of the carcass of the mule lay south to the culvert, along by where the three cars lay?
Ans. They may probably have run them on eight feet south to where the cars dropped off the track.
Ques. I want to know how far it was from where the part of the mule lay to the north end of these cars, and whether they were on the track or not.
Ans. I did not measure it, it was something in the neighborhood of 180 feet; but where the cars left to where the track 6.
Ques. I am asking you about where the north end of these cars were?
Ans. I do not know, I never measured it.
258 Ques. Did you measure anything there?
Ans. Yes, I measured there the distance from where the mule was run over to the pile of the wreck and it was 180 feet.
Ques. Now, who told you to measure that?
Ans. I measured it myself?
Ques. How did you happen to measure it?
Ans. It is our business to look after that.
Ques. You were a day laborer then, were you not?
Ans. Yes sir.
Ques. What did you measure it with?
Ans. A tape line.
Ques. Who helped you to measure it?
Ans. I measured it myself and Mr. Marrs.
Ques. So you say then, that it was 180 feet from the carcass?
Ans. Yes sir.
Ques. How many ties were there put in 180 feet?
Ans. I am no lightning calculator, but I could take a pencil and tell you.
Ques. How far apart are the ties placed?
Ans. About 18 inches, or something like that.
Ques. How many of these long cross ties were there coming back north to where the track was not torn up?
Ans. What do you mean, north from the switch point?
Ques. Did the track stay in tact down to the long ties?
Ans. Down to where the track was torn up, yes, it was all together up to the point of the heel of the switch.
Ques. And this 180 feet did not cover any part of the ground where the ties were on?
Ans. Yes sir, it was somewhere in the neighborhood of 40
259 or 45 feet it come back this side of the — on the track, from the heel of the point of the frog with the head rail is about 6 or 7 feet. The head rail is 6 or 7 feet long.
Ques. Now, then, when you begin to measure this 180 feet; does it begin to measure at the north end?
Ans. We went right straight down the main track to the heel point of the switch?

Ques. Is the lead rail north of the head rail?
Ans. No, it is south; it is the turn off rail.
Ques. Was the track torn up where the lead rail was?
Ans. No, it was still intact and was not torn up. And the track back of the lead rail was all in order. Only a few slipped ties, one or two. All the track that was torn up and that was swept away was south of that lead rail.

By H. D. ALLEN, Att'y for Defendants:

Ques. In answer to a question by Mr. Miller, you said that the ties were 18 inches apart? How do you mean?
Ans. I mean from center to center.
Ques. How do you identify these 38 ties as being the same ties that were in the track at the time of the wreck?
Ans. By the wheel marks on them.
Ques. How do you identify them as being the same ties that you saw there after the wreck?
Ans. Of course they was there, because there has never been any other wreck there at that place since, and there is wheel marks on the 38 ties.

Mr. CHAS. HALL introduced for defendant.

H. D. ALLEN, Att'y for Defendants:

Ques. Where do you live?
Ans. Here in Morganfield.
Ques. Where did you reside before you came to this County?
260 Ans. In Webster County.
Ques. How long have you been living in Union County?
Ans. Nearly three years.
Ques. Where have you lived?
Ans. At Grove Center, most of the time.
Ques. Are you employed by the Illinois Central Railroad Company now?
Ans. Yes sir.
Ques. How long have you been in the employ of that Company?
Ans. Nearly three years.
Ques. Were you in its employ in 1903? when this wreck at Harding Station occurred?
Ans. Yes sir.
Ques. In what capacity?
Ans. Laborer.
Ques. What Section is Harding in?
Ans. On the Grove Center Section.
Ques. I will get you to tell the Jury, Mr. Hall the condition of that Railroad track there on the Curve at Harding Station, at the time of the wreck and before?
Ans. At the time of the wreck it was in good condition, I could not see anything wrong with it. The ties were all at their proper place and properly spiked.

Ques. What was the condition as to ballast?
Ans. It was properly ballasted with dirt, 2½ or maybe 3 inches above the top.
Ques. Is dirt Ballast.
Ans. Yes, we use it as ballast.
Ques. You say that the track had been well ballasted; how high above the level of the ties?
261 Ans. Two or two and one-half inches.
Ques. At what part was this?
Ans. Along where the mule was struck.
Ques. In what condition was that in between that and the public road?
Ans. All about the same condition.
Ques. What was the condition of the ties?
Ans. They were in good condition. I never seen anything wrong with them.
Ques. How often did you pass over that road?
Ans. I passed over it every day.
Ques. What was the condition of the road bed as to being wet or dry?
Ans. It was dry right there at that point.
Ques. How long had it been dry?
Ans. I never did see it wet and sloshy at that point where the mule was struck.
Ques. That was the condition on that curve?
Ans. Yes sir, and on south of there.
Ques. And that was the condition, was it, between the public road and the cattle guard?
Ans. Yes sir.
Ques. Now, you say that road was ballasted, just tell the Jury what you mean there by that?
Ans. It was filled in there where the mule was struck about two or two and one-half inches above the ties.
Ques. How far down was it?
Ans. It was about level down where the long ties were.
262 Ques. You saw the condition there, as to the water standing on it, did you not? What about the drainage?
Ans. It was about 2 or 2½ feet higher there at that point.
Ques. You say that you noticed where the mule got on the track?
Ans. Yes, I saw some tracks there on the railroad bed where the mule; where it looked like it had walked up on the track.
Ques. Then what become of them with regard to the track?
Ans. It looked he had turned and probably made two or three jumps down the track going south and then the train run over it.
Ques. What made you say it made tracks?
Ans. I saw the tracks there.
Ques. Where were they?
Ans. Up in the center of the track, south of the Depot.
Ques. How far were the tracks apart?
Ans. I suppose 10 or 12 feet apart.
Ques. What did that indicate, whether the mule was standing at the time it was struck or laying down?

Ans. It looked as if he were trying to get out of the way.

The Court instructed that the last question and answer was not to be considered as evidence by the Jury when making up their verdict, to which admonition and instruction of the Court the Defendants except and objected.

Ques. Well, what was the condition of the track in regard to the muddiness of the ground at that time?

Ans. I never seen anything wrong.

Ques. What did the ties indicate: Where were the ties:
263 Describe them as to the depth as they went into the ground. About how deep they went into the ground?

Ans. Maybe 1½ inch, or something like that. I could not tell just how deep they went. I never measured them.

Ques. Had you done any work there before the wreck; if so, how long before the wreck?

Ans. We did a little work there about 5 days before the wreck. We raised the joints and tamped dirt under them about five days before the wreck.

Ques. Well, just describe the condition of the track, road bed, ties and rails and so on?

Ans. The track was in very good condition. The ties were in good condition except where the wheels had marked them. Where it left the track the flanges of the wheels, I suppose had cut them and made marks on them. The wheels looked like they went off where it struck the mule.

Ques. Describe these marks that you saw there, where they commenced and where they ended?

Ans. They commenced just where the mule was cut in two and went on down to the switch ties, and on the switch ties down to where the heel of the point was.

Ques. How many of these marks were there?

Ans. I never counted them.

Ques. How many track marks did you see, from one wheel or both wheels?

Ans. One wheel on the left hand side of the left hand rail and one on the right hand side of the right hand *wheel*.

Ques. State whether or not that was a reasonably safe track?

Plaintiff objects to question and answer. Plaintiff's objection sustained and Defendants excepted, and made avowal that
264 witness would say that the track, when the wreck occurred, was a reasonably safe track.

Ques. Mr. Hall, I do not quite understand what you said you were at the time of this wreck?

Ans. I was a section laborer. I was not a section foreman at that time.

Ques. Of what section are you a foreman now?

Ans. Section No. 5½.

Ques. On that section at Harding Station, who was foreman at the time of the wreck?

Ans. Mr. James M. Marrs.

Cross-examination by JOHN G. MILLER, Att'y for Plaintiff:

Ques. I believe you said you saw the mule's tracks where they went upon the railroad track?

Ans. Yes sir.

Ques. How many of these tracks did you see on the railroad between the rails.

Ans. It looked as though the mule had walked upon the track and went down the railroad, and made probably two or three jumps where the train struck him.

Ques. About how far down the track did these tracks go from where the mule appeared to have come up on the track?

Ans. About 30 or 40 feet from where he got on to where he was struck, down the track.

Ques. Which side of the track did the tracks appear to go on from?

Ans. From the west side of the track.

Ques. Did he come across the side track?

Ans. It looked like it, yes, sir, I did not notice for any
265 further marks. He come on the track from the west side as you go south.

Ques. Did you measure the distance down there where the mule was struck to where the long ties began?

Ans. I do not remember whether I did or not.

Ques. Did you measure the distance from where the mule's body lay back to the depot?

Ans. No sir, I did not. I could not give any near or correct distance of it.

Ques. How soon did you reach there that morning?

Ans. About 4:30.

Ques. How many cars were on the track when you got there, standing on the track?

Ans. There were three or four, I do not remember which.

Ques. Had any of them been moved by any other train before that time?

Ans. The wrecker had not come.

Ques. You beat the wrecker there?

Ans. Yes sir.

Ques. One of the cars that were standing on the track was the caboose was it not?

Ans. I think so; I think the caboose was standing on the track and as many as two other cars was standing on the track.

Ques. Did you hear Mr. Pike testify; you heard him speak about these three cars? These were the same cars that he was telling about when he got there?

Ans. I suppose they were.

Ques. Then the number of cars was four, if there was three
266 besides the caboose?

Ans. I suppose so.

Ques. Were all the cars that were in that freight except these four derailed?

Ans. Yes sir.

Ques. Were they all thrown to one side?

Ans. Yes they went off on the south end of the rails, where the track was torn up, and one car was standing there with one pair of trucks off the rails.

Ques. That was one of these three or four; is that right?

Ans. I do not remember whether that was one of these three or four cars or not.

Ques. Were these cars that were standing there all coupled up together or not?

Ans. I never noticed whether they were or not. I did not make any close inspection. I saw that they were there and the south car had the trucks off, the south car had the trucks off there under the south end of it.

Ques. And from that place the rails were torn out of place and the ties displaced?

Ans. Yes sir, the cars were piled down on the side of the track.

Ques. You say that five days ahead of that you had been there doing some work and tamping; what did you tamp with; did you put dirt or gravel under the ties?

Ans. Dirt.

Ques. Did you fill up under all the ends of these ties there?

Ans. Yes sir, we filled up all that needed it.

Ques. Were there some low jointed ties there?

267 Ans. Yes, we made three or four little changes in the place where we took it up and tamped it.

Ques. Had there been any rains to take the dirt from under these ties between that time and the wreck.

Ans. Not that I remember of.

Ques. If at the time of the wreck these ties on the west side were sunk down, how would you account for the fact that the dirt was gone from there if there had been no rains; if they were that way what would you say was the cause of it? Had there been any rains?

Ans. I could not say.

Ques. Had there been any change or moving of the track after you had tamped the ties?

Ans. No sir.

Ques. You filled them up tight under there?

Ans. Yes sir.

Ques. Did not leave any of them along on the west side extending?

Ans. No sir.

Ques. Mr. Hall, will dirt tamping hold these ties firm?

Ans. Certainly, it does do it.

Ques. And that is all you did at that place there?

Ans. Yes sir.

H. D. ALLEN, Att'y for Defendants:

Ques. That was all you needed there, was it not?

Ans. Yes sir, at that time.

Ques. Did you promptly take out the ties that were so dangerous?

Ans. Yes sir.

268 Ques. How many did you have to take out?

Ans. Not over three or four.

Ques. How soon after the wreck? Right after the wreck or how soon after?

Ans. We were repairing the track.

Ques. What did you do with these ties that you took out?

Ans. We threw them out to one side.

Ques. Have you been on that section any time since that?

Ans. I left in the fall after that?

Ques. Did you take any ties after that?

Ans. No sir.

Ques. What did you do with these three or four ties that you took out from there?

Ans. Piled them to one side.

Ques. Were there any other ties that had been taken out before the wreck that was laying out to the side of the wreck and had rotted?

Ans. No sir, not that I know of.

Ques. Was that track level?

Ans. Yes sir.

Ques. Any sinks there?

Ans. No sir, none that I could see.

Ques. Did you do any tamping there, did you tamp it to the end of the tie or did you leave a space there? Just state how you would tamp to it?

Ans. You would put dirt under them and take the handle of the shovel and drive it in there, and we drove it out entirely to the end of the ties; generally it is not necessary to drive it out entirely to the end of the tie to hold the track in place.

269 Mr. —— MORGAN introduced for defendant.

By JOHN W. LOCKETT, Att'y for defendant.

Ques. What position do you occupy on the Illinois Central Railroad Company?

Ans. As bridge Foreman.

Ques. On what division?

Ans. On the Evansville and Hopkinsville.

Ques. It includes the Harding Station section of the road, does it?

Ans. Yes sir.

Ques. How long have you been bridge foreman?

Ans. About seven years.

Ques. What is your duty?

Ans. Looking after bridges, trustles, and see that they are in safe condition.

Ques. Did you know anything about the condition of this track?

Ans. Yes, I have passed over it.

Ques. How did you go along there; on a hand car?

Ans. ——.

Ques. In going past there did you have occasion to notice this track there, this curve in the track there?

Ans. Yes sir.

Ques. How long was it before the wreck were you over that track?
Ans. A few days before?
Ques. What was the condition of it?
Ans. I could see nothing wrong with it. It was ballasted up with dirt and the ties were covered up something like two inches,
270 I suppose, and rounded down to the end of the ties. The switch rails are not rounded up only to the top of the ties.
Ques. What was the condition there of the ground as to being dry or wet?
Ans. It was dry when the wreck occurred.
Ques. I will get you to tell the Jury, if you noticed any sinks of the road bed?
Ans. No sir, the rails were in the proper place, and in fact it was in good shape there.
Ques. Were you at the wreck?
Ans. Yes sir.
Ques. How soon after the wreck occurred?
Ans. I got there about 8:30, I suppose.
Ques. Well, I will get you to state to the Jury if you saw the mule?
Ans. Yes sir.
Ques. From that point where the mule was, 40 yards from the Depot, south, how much of the track was left intact?
Ans. Well, from where the mule was hit, there was, I suppose 150 feet of track still there.
Ques. What was the condition of that track?
Ans. It was in good condition. Where the pony trucks went off on the ties, the ties were marked, and when it got to the point rail everything was swept up from there on down.
Ques. You say it was all swept away?
Ans. Yes sir.
Ques. You did not help replace any of the ties, or any of the track did you?
Ans. I put the bridge back in place.
271 Ques. Now Mr. Morgan, I will ask you if you have, ever, in your experience as a railroad man, on a similar track, ever seen a train derailed by striking a cow.

Plaintiff objected to question and answer. Plaintiff's objection sustained by the Court, and Defendants excepted and made an avowal that witness would state he had seen a train on similar track derailed by striking a cow.

Cross-examination by —— MILLER, Att'y for Plaintiff:

Ques. In speaking of that bridge, you are a bridge foreman?
Ans. Yes sir.
Ques. How wide is that little stream?
Ans. The bridge is about 12 feet long.
Ques. How deep is the little stream under it?
Ans. I judge it to be about 5 feet from the joist to the bottom.
Ques. Did the tracks join on this side of the stream?
Ans. Yes sir.

Ques. Was that stream timbered down to the bottom?

Ans. No sir, we drove the timbers down with the pile driver. It had piling drove down there.

Ques. Had you driven any piling there recently?

Ans. I put piling in something like 10 months before the wreck. I drove piling all along between here and Grove Center.

Ques. Do you know where you was?

Ans. I do not know exactly where we were standing.

Ques. Was it about one mile north of there?

Ans. I could not say just exactly how far it was. I was working up and down there.

272 Ques. Did you go over that place on ——?

Ans. I could not say. I went over it on the hand car, it was my duty to notice trestles. If I notice anything out of order on the track I report to the section foreman as soon as I meet up with him.

Ques. Was that lead rail swept away when you got there that morning?

Ans. The lead rail was all right, and in place, all right up to the heel point.

Mr. William Dillon introduced for the defendant.

By H. D. Allen, Att'y for Defendants:

Ques. Mr. Dillon, how are you employed now?

Ans. By the month.

Ques. By whom?

Ans. By the Illinois Central Railroad Company.

Ques. What position do you hold?

Ans. I am section foreman.

Ques. On what section?

Ans. Section No. 7, Grove Center Section.

Ques. How long have you been foreman on that section?

Ans. Six months, the 9th day of this month?

Ques. Is that portion of the road at Harding Station in that section?

Ans. Yes sir.

Ques. You know where that wreck occurred in 1903?

Ans. Yes sir, I saw the signs of it there.

Ques. I will ask you if between the railroad frog south of the depot, up to the depot, you noticed any marks on the rails as if made by engine wheels?

273 Ans. Yes sir.

Ques. Did you notice any marks on the ties?

Ans. Yes sir.

Ques. From the point where you first noticed them south of the depot on the track, from the railroad frog, or the heel of the switch, I will say to the switch, how many new ties have you put in?

Ans. I have put in three.

Plaintiff objected to question and answer. Plaintiff's objection

to the last question and answer overruled by the Court and exception made by Plaintiff.

Ques. You say you never was there until six months ago?
Ans. ——.
Ques. Do you know whether any body else put in any or not, of your own personal knowledge?
Ans. I do not know.
Ques. You were not there at the time of the wreck?
Ans. No sir, I was not.
Ques. Did not know anything about it?
Ans. No sir.
Ques. In that space there, as I have indicated to you, how many ties from there that way, not marked?
Ans. 14 ties.
Ques. From where the first sign on the ties of the trucks to the heel of the switch, 14 ties in there that shows no signs of any marks?
Ans. Yes sir.
Ques. What sign does it show on the ties there?
Ans. Signs of wheel marks.

274 Mr. JAMES M. MARRS introduced for defendant.

H. D. ALLEN, Att'y for Defendants:

Ques. Where do you live?
Ans. I live at Evansville.
Ques. How are you employed now?
Ans. I am employed in the—— For the Illinois Central.
Ques. Do you know this section of the road where the Sheegog wreck occurred?
Ans. Yes sir.
Ques. At the time of the wreck how were you employed by the Railroad Company?
Ans. As section foreman at that time.
Ques. How long had you been section foreman?
Ans. I had taken charge of the section November 5th, in 1901, I believe it was.
Ques. How often had you been over this part of the road, say for a month preceeding the wreck?
Ans. I was over there twice a day all the whole time I was there, except Sundays, I was seldom over there at all on Sundays.
Ques. What was your *work?*
Ans. General work, most all work was north of Harding, we came up in the morning and back at night, we did general repair work from one end of the section to the other.
Ques. What was your duty as section foreman?
Ans. It is to keep the section in good condition, in the best running order as is possible, and looking after what is needed to be done.
275 Ques. I will get you to tell the Jury, what was the condition of that track the day the wreck occurred, just before the

wreck, with regard to the road bed, ties, rails; the condition in general?

Ans. The track at that time was in fairly good condition. We had done a little repair work about five days before the wreck occurred such as raising about two or three low joints, which had sunk down from soft weather, we raised them up and tamped there under them.

Ques. What was the condition of the ground when you did the last work there?

Ans. The ground was dry enough to work well with a shovel.

Ques. What was the condition of the road bed as to being solid or not solid?

Ans. The road bed was solid.

Ques. Tell the Jury, the condition of the ties as to soundness?

Ans. The ties was, I called sound ties. There was no ties there that showed any defect. At that time the ties were sound all along. There was ties that had been put in the fall before and no ties needed replacing at the time I did the repairing.

Ques. What was the condition as to the space of the ties on the railroad bed?

Ans. They were all properly spaced, there are about 18 ties to each 30 foot rail; well spaced and fully four spikes to a tie.

Ques. Were there any spikes there that could have been drawn up by your hand?

276 Ans. No sir, Not without a bar to draw them with.

Ques. With regard to the ballast or dirt between the ties, describe that?

Ans. About two inches of dirt, ranging from about one and one-half to two inches of dirt over the ties in the center, sloping down gradually under the rail, to drain the water from the top of the tie.

Ques. Now, Mr. Marrs, is this track there by the side of the switch track, and where the accident occurred, is that a separate track from the switch?

Ans. Yes sir.

Ques. Where do the switch track and the other track join, about how far below where the mule was struck?

Ans. About 120 or 130 feet beyond that.

Ques. Please state to the Jury whether or not there was a drain from the center of the track on both sides of the Railroad track?

Ans. Yes sir.

Ques. Please describe to the Jury how that track was drained?

Ans. On the west side there was an embankment from about 18 inches to two feet high, on the west side next to the side track it was some higher than the side track all the way down and about a six inch tiling run from the side track to drain the water out into the right-of-way, there was a good drainage on each side there.

Ques. Please describe how the main track was drained from its center towards the edges thereof, from the point where the mule was struck to where it joined the switch?

Plaintiff objected to question and answer. Plaintiff's objection over-ruled and exception made my Plaintiff.

277 Ans. The drainage was good.

Ques. Please describe the track and the construction of the road bed and the track on it from the point where the mule was struck to the frog of the switch?

Ans. The track was drained good on each side, and so drained the water from the center of the track to the outer edge of the ties, and it was drained sufficient to carry the water from the end of the ties, out into the right-of-way drains.

Ques. Please tell the Jury, whether there were or were not any sinks or depressions in that track at the time of the wreck?

Ans. No sir.

Ques. What had been its condition in that respect, say for three weeks prior to the wreck?

Ans. Well it was fairly good except one or two joints that had gone down a little.

Ques. Are these the joints which you spoke of in the beginning of your testimony?

Ans. Yes sir.

Ques. State whether or not the track was at that time in a reasonably safe condition for the operations of trains?

Plaintiff objected to question and answer, which objection was sustained by the Court to which ruling of the Court the defendants excepted, and made avowal that witness if permitted to answer would say that the track was then in a reasonably safe condition for the operations of trains.

Ques. Were you there after the wreck?

Ans. Yes sir.

Ques. How soon?

278 Ans. I got there about 4:30 or 4:40 somewhere in there.

Ques. In the morning?

Ans. Yes sir, in the morning after the wreck occurred.

Ques. Please state how many cars, if any, were remaining on the track south of the depot?

Ans. I did not count the cars there, there was 15 or 16, I suppose; there was 12 or 15, maybe more, in the wreck, and I never went back further than the mule, I looked back and noticed the caboose there, I never counted any cars at all, I did not count them.

Ques. You say you noticed where the mule was struck?

Ans. Yes sir.

Ques. How far to the South was that from the Depot?

Ans. It was about, I think the length of three thirty foot rails, about 90 feet or may be more.

Ques. Did you see any part of the mule?

Ans. Yes, its head and shoulders.

Ques. The fore half?

Ans. Yes sir.

Ques. The head and neck and shoulders?

Ans. Yes sir.

Ques. Where was this part of the mule lying?

Ans. Right along on the end of the ties, laying maybe two feet from the rail, at the side of the rail, maybe not so far.

Ques. Please state if you observed, if at all, where the truck had left the rail, and if so, at what point?

Ans. It left just immediately after it run over the mule, and it looked as if where the bar or the pony trucks, I suppose, had
279 cut in and they followed the rail on the outer flange on the west side, and the inner rail on the east side, and run on around the curve until they got over nearly to the lead rail, and then seemed to come back nearer the rail again, until it struck the lead rail; then it commenced to crowd off and run down to near the end of the switch point, the heel of the switch point, then everything was a total wreck, everything was swept out and you could not tell how this went from there on.

Ques. Did you help clean away the wreck?

Ans. Yes sir.

Ques. Please tell the Jury the condition of the track to where it appeared that the mule had been struck to where you say it was totally torn away?

Ans. It looked good enough. All the repairing I did, I did after the wreck was all cleared. I put in two new ties in the switch ties, there was 52 out of the 54 switch ties that remained, and I put in two new switch ties in that part of the track.

Ques. When did you put these two ties in there?

Ans. Probably a day or two after the wreck?

Ques. What do you mean by Switch ties?

Ans. I mean the ties that connect the side track and the main track together. They lead across there to run cars from the main track to the siding.

Ques. What is the length of these switch ties?

Ans. From 8½ to about 17 feet long, it is back next to the frog the ties are 17 feet long.

Ques. What was the condition of the track where the
280 switch and the track were connected by these ties?

Ans. It was good, from up about at this point, from that point on to probably 90 feet or more, the track was all built new previous to that time.

Ques. South from there?

Ans. Yes, all new switch ties.

Ques. What was the condition of the track, ties, rails on that part of the railroad bed constituting the main track not connected with the switch bed?

Ans. It was good?

Ques. Describe it?

Ans. The condition was good, the ends of nearly all the ties were marked on down from there, but only two ties were injured.

Ques. Did you replace these two ties right away?

Ans. I did not trouble them there until I got the other track in good condition, then I took them out.

Ques. You say only two ties were necessary to be taken out?

Ans. Yes, north of the switch ties.

Ques. What was the condition of the rails then on the ties, whether they were in position or not?

Ans. Yes sir.

Ques. What kind of position?

Ans. They were spiked down four spikes to a tie all along every rail. It was the proper gauge, it was in fairly good line.

Ques. Tell the Jury whether there were any sinks in that part of the track; any displacing of the ties or rails?

Ans. No sir, none at all.

281 Ques. I will ask you in regard to jacking up the track there, either north or south of the station on the curve some time before this wreck. Please state if you know anything about that?

Ques. We had used what we call track jacks; we had used them north of the road crossing on that curve, north of the station, we had to allign the track there during the wet time in March, on the north of the Station.

Ques. Did you use any jack in aligninging it; did that track south of the road, need alignment?

Ans. No sir, we would use common steel bars. It had not been in need of it except that joint that we raised, since in the fall before.

Ques. At the time of this accident, was it or not in proper allignment?

Ans. Yes sir, it was in proper alignment; it is our duty to keep the track in proper alignment, the curves as well as any part.

Ques. After you put in these new ties, how long did you remain there as Section foreman?

Ques. Until the 27th of July, 1904.

Ans. Please state to the Jury in addition, what ties were put in there, if any, from the point where the mule was struck, from there on to the switch?

Ans. Maybe as many as four, I do not think more than four, during the balance of the time that I stayed on the section.

Ques. Did any one else put in any there durung that time you were section foreman?

Ans. No sir.

Ques. Have you been there recently?

282 Ans. Yes, sir.

Ques. When did you examine these ties last in that part of the track?

Ans. I examined them a few days ago.

Ques. I will get you to tell the Jury how many ties there are from the point where the mule was struck down to the switch ties, on the main track?

Ans. There was about 52 or 54, I do not remember exactly which.

Ques. How many of these ties now are in there that were there when the accident occurred?

Ans. About 38 I believe.

Ques. Did you count them?

Ans. Yes sir.

Ques. I will get you to state just how many there were in there where the accident occurred that are not marked?

Ans. About 14 or 15 ties there that are not marked, I suppose they have been replaced since the wreck.

Ques. How many of these switch rails that were there when the wreck occurred, just immediately after the wreck occurred, are still there?

Ans. All there. All the switch rails are there. There was two 15 foot switch ties that have been put in new, they were put in immediately after the wreck.

Cross-examination by JOHN G. MILLER, Att'y for Plaintiff:

Ques. You now live in Evansville, do you?

Ans. Yes sir.

Ques. You were living, you say, at Grove Center, at the time this accident occurred?

Ans. Yes sir.

283 Ques. You was the foreman of this track at that place, that section?

Ans. Yes sir.

Ques. When was it that you raised one of these low joints just prior to the accident; just how long?

Ans. About five days before the wreck occurred.

Ques. You spoke of raising one in March?

Ans. We raised some joints in March.

Ques. You say you raised some of these joints four or five days before this accident?

Ans. Yes sir.

Ques. What else did you do to this track at this time?

Ans. To the best of my knowledge, we alligned one joint, all that was needed around the curve at that time.

Ques. That all you did?

Ans. Yes sir, we dressed the joints up enough to stand a year, we always finish our work as we do it before we leave it.

Ques. Did not it need ballast?

Ans. No sir.

Ques. How long had it been since you had done any ballasting there?

Ans. The fall before.

Ques. The fall before you filled in around there with what you call dirt ballast?

Ans. Yes sir.

Ques. You testified at Henderson in the case of Manion against the Railroad Company did you not?

Ans. Yes sir.

Ques. Your name is James M. Marrs?

Ans. Yes sir.

Ques. Did not you say there was no ballast there then? In

284 answer to a question asked you in that trial?

Ans. I said there was no ballast, just dirt ballast.

Ques. Well, how long before the accident had this track been ballasted up?

Ans. I do not remember.

Ques. Did you not answer, there was no ballast down there. It was just a dirt track surface?

Ans. Well, it was then just what it is now. We call a dirt track surface, what we call ballast is where it is filled in with rock or gravel, this was ballasted, as you call it, with dirt ballast at the proper height.

Ques. At what point had you used this rock and stone ballast?

Defendants objected to question and answer. Defendants' objection over-ruled and exception made by Defendants.

Ans. At different points where it is liable to slosh.

Ques. I shall ask you, Mr. Marrs, if it is not important to use gravel ballast or stone ballast where-ever there is a weak place. I will ask you if stone ballast was needed anywhere, whether it was not needed at this place?

Defendants objected to question and answer. Objection of Defendants over-ruled and exception reserved by Defendants.

Ans. It was not needed there for one reason, it had good sound bed and it did not need anything of that kind. Dirt ballast, as you have been calling it was sufficient to hold it.

Ques. There was gravel just beyond there on the straight track was there not?

Ans. Yes sir.

Ques. Why should it be on the straight track just beyond
285 that place, and not be on this track at this curve?

Ans. I could not say why; it was put there before ever I come there.

Ques. It is also ballasted on that curve this side of Harding Station is it not?

Ans. Yes sir.

Ques. Can you explain why it should be this side and not be in there on that curve?

Ans. I could not say, it was put there probably a year before I come there.

Ques. Now, in that same cross examination at Henderson, in that same trial, in your testimony, I will ask you if you were not asked this question, and if you did not give this answer? "Did you notice the track and the cross ties where the train run off the track?" "Answer "yes, there was about four ties just scattered along about one to a rail, there was four ties there with the ends chopped off wher- the trucks had cut them, up to where they struck the lead rail on up to the heel of the switch, and there commenced to take up everything; it cleaned this track on the south end?"

Ans. Yes sir.

Ques. And the four ties was taken out? You say there was four ties to a rail?

Ans. No sir.

Ques. Did you notice the track and the cross ties where the train run off the track? You were asked this question and you answered "Yes, about four ties were just scattered along, about one to a rail, up to where they struck the lead rail on out where it com-
286 menced to take the track up clean, and it took everything up clean with it?

Ans. Well, there was not over one tie to the rail, there was four ties two switch ties and *two switch ties and* two track ties.

Ques. I will ask you about this, in that same testimony, at that same trial, was not this question asked you, and did not you make this answer? "Did you notice the track and the cross ties where the *cross ties where the* train run off the track?" Answer, "Yes, there was about four ties just scattered along about one to a rail, and there was four ties there with the ends chopped off, where the trucks had cut them up to where they struck the lead rail on up to the head of the switch?

Ans. I do not remember whether I did or not.

Ques. And were you not asked as to the condition of the ties as to being sound or rotten, and did you not answer "Well now, probably there was a tie, maybe one tie to a rail along there, that you might say was rotten, but there was good sound, solid ties on each side of the rotten ties?" Did you make that answer?

Ans. Perhaps I did; I can not say.

Ques. And were you not asked this question, and did you not make this answer, "There would be probably one rotten tie in a rail?" Answer "Yes, sir, maybe two to 30 feet."

Ans. I do not think I made that answer.

Ques. You do not think you did?

Ans. No sir.

Ques. How far is it from that little Depot there down to the Culvert?

287 Ans. I could not say just how far it is; I have been there, but never paid any attention as to just the amount of feet, It is something like 150 yards, I suppose.

Ques. You say you think the mule was struck somewhere about 90 or 100 feet south of that little Depot?

Ans. Yes sir, about 90 feet, I will not be positive.

Ques. You said that there were some cars still standing when you reached there about 4:30 in the morning?

Ans. Between 4:30 and 4:40.

Ques. And there were some cars still standing?

Ans. Yes sir.

Ques. One of these cars was the Caboose?

Ans. Yes sir.

Ques. Did you notice it still standing on the track?

Ans. Yes sir.

Ques. I believe that you said -while ago that you did not go further back than to where the mule was cut in two to notice?

Ans. Yes sir, that is as far as I went, when I turned round, I noticed what looked like the head of the mule lay back towards the back of the cars that were left standing between the depot and the switch. I think beyond the cars, north of the cars this way.

Ques. The car on the south end of these that was left standing there was derailed, was it not?

Ans. Yes sir, one car right at the end of the switch point that was derailed.

Ques. At the north or south point?

Ans. At the south point. It had run over the rail, across
288 over the rail on the outside; I suppose following the engine, there was one car, I believe, was all that had just dropped off.

Ques. Was that pair of trucks south of the lead rail or north of it?

Ans. One pair of trucks was on the inside of the lead rail and one pair on the outside.

Ques. Was it still standing north of the lead rail or was it south of the lead rail?

Ans. It had not got quite to the switch point, but it was past the lead rail?

Ques. Was it across the lead rail?

Ans. No sir.

Ques. How did it get past the lead rail?

Ans. I suppose the weight of the engine jerked it over?

Ques. Did it get off the lead rail?

Ans. It was near the end of the lead rail.

Ques. What I want to get at is how that car got to the place south of the lead rail, if it did not go along on the rails of the track, and did not cross the lead rail?

Ans. It would not have had to cross the lead rail. It followed the main rail and fell on the outside of the lead rail.

Ques. Is that south of the head rail?

Ans. Yes sir.

Ques. Then, it stayed on the main rail of the track until it reached the point just south of the switch point?

Ans. I can not say.

Ques. Did you mean that it jumped off the track and then
289 jumped back again?

Ans. I could not tell how it did.

Ques. Is it not a fact that you could not tell very well how these cars left the track?

Ans. After you got up to where it was all torn up, you could not tell.

Ques. Had not this car passed the frog, toward the crossing when it turned out?

Ans. About the other end, something near the other end.

Ques. Now, Mr. Marrs, this is about a fair representation of the place there is it not? (Indicating map.)

Ans. Tolerably fair.

Ques. Would you say that was about where the mule was cut in two?

Ans. Yes sir, something like that.

Ques. This is about where the culvert or cattle guard was?

Ans. Yes sir.

Ques. This line on the west side of the track leading up to the dirt road is the place that was along the line of right-of-way?

Ans. Yes sir.

Ques. And that represents the fences on the other side east of the track, going from this culvert up to the dirt road on the west side of the track?

Ans. Yes sir, That is somewhere near right I think.

Ques. There was no cattle guard or anything in here along here,

up to the dirt road, here anywhere, to prevent animals going down into this place here?

Ans. No sir.

290 Ques. South of this place here?

Ans. No sir.

Ques. Cattle was in there every day, were they not?

Defendants objected to question and answer. Defendant's objection sustained and exception made by the Plaintiff.

Ans. Yes sir, I have been there often and seen cattle in there.

Ques. You were there that morning of the wreck were you?

Ans. Yes sir.

Ques. You have told about these ties being solid and the condition of the ties and the track there recently. I will ask you if it is not a fact that there, and even as late as last Sunday, that some of these ties right on that curve where the accident occurred are in such a condition that a man, if by just stooping down, he could pull up these spikes with his fingers.

Defendants objected to question and answer. Defendant's exception reserved to the Court's over-ruling of objection. Question withdrawn.

Ques. How many spikes were there to a tie, at each end to hold the rail in place?

Ans. Two. Four to a tie; two on the east side of the track and two on the west side; four spikes to a rail.

Ques. That is always the case?

Ans. Yes sir.

Ques. Is that always the case with a railroad?

Ans. That is the purpose of these spikes, that is to hold the track in proper condition, in the proper place.

Ques. You were there at the wreck were you?

291 Ans. Yes sir.

Ques. Who was the conductor of that train that was there?

Ans. I do not know.

Ques. Were you acquainted with him?

Ans. No sir, I have seen him passing over the road.

Ques. Mr. Durbin, is that not his name?

Ans. I believe it is.

Ques. Mr. F. J. Burbin, is not this Mr. Durbin sitting there?

Ans. Yes sir.

Ques. He has been here during this whole trial has he not?

Ans. I think I saw him the first day I come here.

Ques. Who else was with that train?

Ans. I do not know, the flagman, I did not hear his name called.

Ques. How many were in the crew?

Ans. Five, the best I could remember.

Ques. Where are the others now?

Ans. I do not know. There was Mr. Durbin, I did not know the flagman, there were three killed.

Ques. Who were they?

Ans. Mr. Sheegog, Mr. Manion, and the colored fellow they called Cæsar.

Ques. Where is that flagman?

Ans. He was killed in the wreck. I do not know where he is now.

Ques. The flagman, I mean?

Ans. No sir, I have not seen him since immediately after the wreck.

By H. D. ALLEN, Att'y for Defendants:

292 Ques. Now, Mr. Miller, has asked you if ballast had not been used this side of that curve and beyond the curve, and you stated that you saw evidence of ballast being used. Did you know when it was put there?

Ans. No sir, it was put there before I was on the Grove Center Section.

Ques. You did not know why it was necessary to put it there?

Ans. No sir.

Ques. Did not I understand you to say that ballast was not necessary at the place here in question, that the rock or gravel or cinders were not necessary?

Ans. I did not think so.

Ques. Now Mr. Marrs, I will ask you that if this state of affairs had existed there, if the whole road bed was not raised out of the bottom?

Court sustained objection of Plaintiff. Defendants excepted and Defendants made avowal that witness would say that the whole road bed where it passed through the lowlands at and near Harding had been levi-ed up.

Ques. What are angle bars?

Ans. They are used to hold the joints of the rails together.

Ques. Do you mean where the rails join together?

Ans. You put the angle bar, one on each side, they are put on with four or six spikes.

Ques. What was the condition of the track there, that is from the Depot to the wreckage with regard to angle bars?

Ans. Good.

Ques. Were they all attached?

Ans. Yes sir, and fully spiked.

293 Ques. I will get you to tell the jury if you examined them after the wreck, and if so, what was their condition at the time.

Ans. Good, down to the switch where everything was swept out, of course, everything, bars, rails, and everything was swept out.

Ques. What do you mean by good?

Ans. Solid, not broken?

Mr. Doc Marrs introduced for defendant.

By John W. Lockett, Att'y for Defendants:

Ques. Where do you live?
Ans. Grove Center.
Ques. How long have you lived there?
Ans. A little better than two years.
Ques. Where did you come from?
Ans. Webster County, Kentucky.
Ques. Are you a native of that County?
Ans. Yes sir, I was raised there.
Ques. What is your occupation?
Ans. I am teaming now, at Grove Center.
Ques. In the employ of the Illinois Central Railroad?
Ans. No sir.
Ques. You are acquainted with the condition of the track at the point where that train was wrecked on May 7th, 1903?
Ans. Yes sir.
Ques. How often had you been over it just preceeding the wreck?
Ans. Generally about twice a day. Our work was done north of there and it threw us to cross it about twice per day.

294 Ques. You were then in the employ of the Illinois Central Railroad?
Ans. Yes sir.
Ques. In what capacity?
Ans. As Laborer.
Ques. Were you employed to assist in keeping the track in condition?
Ans. Yes sir.
Ques. Did the section you worked on include Harding Station at the time of this wreck?
Ans. Yes sir.
Ques. Tell the Jury the condition of that track at the time of the wreck, and when you had been over it last before the wreck?
Ans. It was in a reasonably good condition.
Ques. State whether or not the track was at that time in a reasonably safe condition for the operation of trains.

Plaintiff objected to question and answer, which objection was sustained by the Court to which ruling of the Court the Defendants excepted, and made avowal that witness if permitted to answer would say that the track was then in a reasonably safe condition for the operation of trains.

Ques. When had you been over it?
Ans. The day before the wreck.
Ques. Explain to the Jury, what you mean by reasonably good condition?
Ans. What I call reasonably good condition is for a road to be ballasted sufficient to drain it, to dry it.

Ques. What was the condition of the ground as to wetness

295 or dryness?
Ans. It was reasonably dry at that time.

Ques. What was the condition of the ties that went in the road bed at that point?

Ans. The ties were scarred, but there was not any of them that was necessary to be removed.

Ques. Were they so bad cut that it was necessary to remove them?

Ans. No sir.

Ques. How were the rails, were they in their proper place?

Ans. Yes sir, proper shape.

Ques. How were they connected together?

Ans. They were connected with angle bars, which are bolted to the rail and spiked down to the ties.

Ques. Did you live at Grove Center at the time of the wreck?

Ans. Yes sir.

Ques. Were you at the wreck?

Ans. Yes sir.

Ques. What time did you reach there?

Ans. I got there somewhere between four and five o'clock. I do not remember just what time.

Ques. In the afternoon or in the morning?

Ans. In the morning.

Ques. When you got there describe the place of the wreck, how many cars you saw in it and so on?

Ans. I never paid any particular attention to the cars; it was a terrible wreck; everything was scattered there. When I went up on the west side of it to the Depot and crossed the track and took only a glancing view as I passed down, and then I went to wrok.

296 Ques. Did you go to work on the wreck?

Ans. Yes sir. Began to carry out goods at the far end of the wreck.

Ques. When did you get the track cleared so that trains could pass over it?

Ans. Some time that evening, I do not know what time it was.

Ques. Did you see any portion of the mule there on the track?

Ans. I saw a portion of the mule laying on the track. I did not pay any particular attention to it. I passed along and saw the mule and went down on the other side and went around back up to the engine and went to work.

Ques. Well, I will get you to tell the Jury what you saw there to indicate that that was the point where any wheels had got off the track?

Ans. I saw a part of the mule there of course, and blood on the track, and there it looked as if the wheels had jumped off the track at that point, and these marks in the ties were made by the iron piece on the wheels.

Ques. Was these marks on the ties the day before when you went over it?

Ans. No sir.

Ques. Were there any cars on the track at the point where the mule was run over?

Ans. Yes, sir, there was cars standing along on the track, I did not pay any particular attention about how many.

Ques. There were some cars there?

Ans. Yes, sir.

Ques. When the cars were pulled back, did you go over the track between where the mule was found and where the wreckage
297 was complete any time that day?

Ans. No sir.

Ques. When did you go over it?

Ans. In a few days after the wreck.

Ques. What was the condition of the ties between these two points at the time you went over it?

Ans. They were very good ties.

Ques. What was the condition of them?

Ans. Three or four was destroyed, the ends of them were mashed.

Ques. Did you help put in any new ties?

Ans. I help put in about four.

Ques. Were there any other ties in that point that were unfit to be used under a railroad at that time?

Ans. No sir, we considered them safe.

Ques. I will get you to just tell the condition of these ties that were not broken up?

Ans. They were solid enough, and seemed to be sound and all right.

Ques. Did you take any notice of the distance between the mule and the Depot on this side, and from the mule to the heel of the switch point?

Ans. No sir, not particularly.

Ques. Did you count the ties between the place where the track was entirely torn up to the place where this mule was?

Ans. Yes sir.

Ques. How many were there?

Ans. 111.

Ques. How many was broken up?

298 Ans. About four, 111 that was marked and about four that was broken out.

Ques. Did you include the switch ties as well as the main track?

Ans. Yes sir.

Ques. 111 includes the ties upon the track as well as the switch track?

Ans. Yes sir.

Ques. At the time of this wreck what was the alligunent at the point of the track where the wreck occurred?

Ans. It was in proper line.

Ques. I understand the alligunent of a road means whether the road is in line or not?

Ans. Yes sir.

Ques. It was properly lined at that time?

Ans. Yes sir.

Ques. Something was said by a witness about jacking up some part of that track north of this road crossing, do you know anything about that?

Ans. We worked on that about twice, I believe. It was before

the wreck, we raised the places, the low places, and dirt was tamped under them to make a solid bed for these ties.

Ques. Was any jacking done at any time before the wreck on the part between the road crossing south to the point where the track was torn up?

Ans. I have no recollection of that.

Ques. When the jack was used was the track in good condition at that poi-t where the track was torn up?

Ans. Yes sir, we always, when we worked on the track,
299 considered it in good condition before we left it.

Ques. Was it in good condition when you left it?

Ans. Yes sir.

Ques. How far north of the road crossing was this point?

Ans. We commenced work right along about the road and worked on towards the switch.

Ques. I speak particularly of the point where you used the jack, this road along between the road crossing and where the point of the switch?

Ans. Yes sir, we put two or three ties in there four days before the wreck.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. Mr. Marrs, you, I believe, said you were in the employ of the Illinois Central Railroad Company at the time this wreck occurred?

Ans. Yes sir.

Ques. And went with the section force that morning?

Ans. Yes sir.

Ques. You are a relative of Mr. J. M. Marrs, who testified?

Ans. Yes sir.

Ques. He is your son?

Ans. Yes sir.

Ques. He was the section foreman at the time this wreck occurred?

Ans. Yes sir.

Ques. You were a member of the section force?

Ans. Yes sir.

Ques. You went with him at the same time to the wreck?

Ans. Yes sir.

300 Ques. Reached the wreck about 4:30 in the morning?

Ans. Yes sir.

Ques. How long after that did you continue in the service of the Company?

Ans. Until last July.

Ques. July of 1904?

Ans. Yes sir.

Ques. Did your son also continue all the time in the service?

Ans. No sir, he quit in July, we both quit together?

Ques. I believe you say when you went there that morning, you went from Grove Center?

Ans. Yes sir.

Ques. The wreck train had not then arrived?

Ans. Yes sir.
Ques. Was there any prior to the coming of this wrecker?
Ans. No sir.
Ques. I believe you say you did not count the cars standing there?
Ans. No sir, I did not notice them particularly.

E. DEERING introduced for defendant.

By H. D. ALLEN, Att'y for Defendants:

Ques. Where do you live?
Ans. Princeton, Kentucky.
Ques. What County is that in?
Ans. *Caldwell.*
Ques. Where were you residing in May, 1903.
Ans. Caldwell County, Kentucky.
Ques. Are you in the employ of the Illinois Central Railroad Company now?
Ans. Yes sir.
301 Ques. In what capacity?
Ans. Foreman of section 19 in Caldwell County, Kentucky.
Ques. Does that embrace the Harding Station Section?
Ans. No sir.
Ques. Were you employed by the Illinois Central Railroad Company at the time of this wreck?
Ans. Yes sir.
Ques. In what capacity?
Ans. Section Foreman.
Ques. Where?
Ans. Marion, Kentucky.
Ques. Were you at the wreck?
Ans. Yes sir, that morning after it occurred.
Ques. What time did you get there?
Ans. Some time about nine o'clock.
Ques. You helped to remove the wreck?
Ans. Yes sir.
Ques. I will get you to tell the Jury your observation there, what you saw, the condition of things generally, there from the depot south.
Ans. They took me up on the pas-enger train at Marion, me and my men, we got as close as we could to the wreck, and unloaded tools and men. There was, I think, two boxes across, turned crossways of the track; the wrecker was ordered out from Paducah, but we did not know when it would get there; we took the freight out of these two cars, that was the first thing I went to doing after I got there.
Ques. State what you observed with reference to the train when you got there?
Ans. All the cars were derailed, except four or five, I do not remember exactly.
Ques. Where did you observe a portion of the mule?
Ans. Between the time I got there and about 12 o'clock.
302 After I got there I went to the other side of the track, up to the Station, Harding Station, then I saw the mule piled up

to one side. It was laying ten or fifteen feet from the rail, out into the ditch when I saw it.

Ques. Did you examine the track there?

Ans. I noticed to see where it went over the mule, and all I could see was the blood on the ties.

Ques. What did you see, just tell the Jury please?

Ans. I just saw some blood and some marks on the ties.

Ques. What kind of marks on the ties?

Ans. Where a wheel had run over them.

Ques. Where did you see these marks?

Ans. From where the blood was on to that switch track. On the left hand side of the rail and on the inside of the curve on the inside of the rail.

Ques. How far did that extend?

Ans. To the heel of the switch point.

Ques. How far was that from where the mule was struck?

Ans. About six rail lengths.

Ques. Rails are about 30 feet long?

Ans. Yes sir.

Ques. Then that would make about 180 feet?

Ans. Yes sir.

Ques. What occurred from there on?

Ans. It was torn up, bridge, ties, rails and everything else for about 90 feet.

Ques. I will ask you if the rough diagram I show you here, and which we will mark "A" is a correct representation of the location of the track at the place of the wreck?

Ans. That looks something like it.

Ques. This point here represents the depot, and this road is the public road across the main track and switch. This is the south and this is the north end. I understood you to say that you ob-
303 served on these ties here the impression of wheels that had gone down?

Ans. Yes sir, about here on these and inside there on that.

Ques. About here is represented as where the first ties are marked, from this road crossing to where you saw the blood, at where the first ties were marked, how far was that?

Ans. From there to where I first saw the marks on the ties, it is 8 rail lengths.

Ques. And you say the rails are about 30 feet; then that is about 240 feet?

Ans. Yes sir.

Ques. What is this line running over there?

Ans. That is the lead rail from the frog to the switch point.

Ques. Is that lead rail fastened down?

Ans. It is spiked to the ties inside the switch point.

Ques. About how far?

Ans. Two rail lengths.

Ques. What do you mean by a switch point?

Ans. ——.

Ques. Where did you last notice these impressions on the ties with reference to this lead rail?

Ans. They run on up here to near the switch point here. I noticed the impressions on this lead rail here, where the wheel struck it here somewhere about this — or out to the south of this —.

Ques. What course did it take?

Ans. To the left.

Ques. Where did you last see it then?

Ans. About the heel of the switch point.

304 Ques. When you last saw the impression of this right hand truck how far was it from the main rail on the outside on the *on the* curve on the rail going south?

Ans. Yes sir.

Ques. How far?

Ans. I never noticed.

Ques. How near then had it gone to this point here at the end of the switch rail, where you last saw the impression on the lead rail?

Ans. I do not remember where I saw it. It struck it about here close to the frog and went on down maybe 30 feet.

Ques. After it got to the heel of the switch rail, what was the condition of the track or wreckage from that?

Ans. All swept up, cross ties, rails and everything.

Ques. About how far did that extend?

Ans. 90 feet.

Ques. Where was the engine?

Ans. About 30 feet south of that little bridge or close to it. I mean 30 feet south of the bridge.

Ques. How was it turned?

Ans. It looked like it was shoved out that way and turned and fell on her side.

Ques. On which side?

Ans. On the right side, with the head of the engine towards the rail fence. There was a fence out there in about 40 ft. of the track.

Ques. Did you help to remove the wreck?

Ans. Yes sir.

305 Ques. Please, tell the Jury now, Mr. Deering, if in working there after the wreck was removed, you noticed the condition of the track from the north point of the switch rail back to where the mule seemed to have been struck?

Ans. Yes sir, I noticed that.

Ques. What was the condition of that road bed?

Ans. The ties were sound, they were not torn up to amount to anything, only marks on them; marks of the flanges of the wheel which splintered them up some, the road was well ballasted 2½ or 3 in. above the ties sloping down under the bottom of the ties to give the track a good drainage.

Ques. What was the condition of the rails, and track as to being in proper alignment?

Ans. The track was in line and spiked four spikes to the tie. Four or five ties were broken on the end more than the rest of them.

Ques. Where were they?

Ans. They were scattered about to where the end of the switch ties connected to the end of the —.

Ques. What was the condition of the rails in regard to the angle bars?

Ans. The angle bars were in proper position.

Ques. Please state, Mr. Deering, the condition of that road bed and the ties as to being solid and firm at time?

Ans. The dirt was dry and solid at that point, the ties were sound, they looked to be sound and had very good drainage from the track.

Ques. Was there any depressions in the track by which any portion of it was sunk?

Ans. No sir, I did not see any at all.

306 Ques. What was the condition of the ties across the switch track?

Ans. They were sound, good ties except had the marks of the wheel on them.

Ques. Did you help repair the track?

Ans. Yes sir.

Ques. Tell the Jury how many ties were taken out from the crossing to the switch point?

Ans. I do not know. I did not notice that.

Ques. Have you been there recently?

Ans. Yes sir.

Ques. When?

Ans. Yesterday morning.

Ques. Mr. Deering, tell the Jury if you counted the ties from where you say the wreck or the derailment began, to the end of the switch?

Ans. Yes sir.

Ques. How many were there all together?

Ans. 52 cross ties, and 54 switch ties.

Ques. The Cross ties you mean were on the main track?

Ans. Yes sir.

Ques. And there were 54 of the others?

Ans. Yes sir.

Ques. Just tell the Jury if you identified any ties that were there at the time the wreck occurred, and if so, how did you identify them?

Ans. Yes sir, I identified them by marks where the wheel had run over them, 38 of the Cross ties and 52 of the switch ties.

307 Ques. 38 of the original cross ties were remaining, and out of the 54 switch ties, 52 were remaining?

Ans. Yes sir.

Ques. They had the mark of the wheel on them?

Ans. Yes sir.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. Did you ever work on this section here?

Ans. No sir.

Ques. How near did you ever work?

Ans. Well, I worked here at Uniontown, then my headquarters were at Marion, the closest to it where I had control of was Marion, but I have done extra work just backward and forward. I went to Uniontown and done a lot of work on that section.

Ques. Did you go by this place to go to Uniontown?

Ans. Yes sir.

Ques. The Uniontown Branch leaves at this place, Morganfield?
Ans. Yes sir.
Ques. You would go on the train?
Ans. Yes sir.
Ques. You were working at Marion at the time of this accident?
Ans. Yes sir.
Ques. How far is that from Harding Station?
Ans. About 30 some odd miles.
Ques. The only observation you ever made of this track was on the morning of this wreck?
Ans. Yes sir.

Ques. When you come up there upon the passenger train,
308 you found two of the box cars across the track?

Ans. I think there was two.
Ques. They were south of the engine?
Ans. Yes sir.
Ques. How far were they south of the little bridge or culvert?
Ans. They were south from the engine, right below the engine.
Ques. They were just turned across the track right ahead of the engine from here?
Ans. Yes sir.
Ques. They had run a little farther on the track than the engine?
Ans. Yes sir.
Ques. How far did the engine run?
Ans. I do not know?
Ques. The track was all torn up to where the engine was?
Ans. Yes sir. Part of the rails was torn up with the engine, the ties were shoved out on each side, some went one way and some the other.
Ques. Was there any mark or indication east of that culvert between the culvert and the field on the east to indicate that the engine or anything had passed between the culvert and the field?
Ans. I do not know what you mean.
Ques. Suppose this is the culvert on the south, and this back here is the switch stand, was there anything to indicate that the engine or any car had passed over the switch stand along the right-of-way between the culvert and the field to where the engine lay?
Ans. I never noticed any.
Ques. If there had been such track as of an engine made there, would you have noticed it?

309 Ans. I do not remember.

Ques. You were there and examined this track. You have been testifying pretty closely have you not? I want to ask you if you did not notice any tracks where the engine passed?
Ans. I did not notice any further.
Ques. From there you say it swept that track there on south of that culvert?
Ans. The engine or cars, I do not know which.
Ques. What time of day was it when you reached there?
Ans. About 9 o'clock, I think, as well as I can remember.
Ques. Were there some cars left standing and not over-turned?

Ans. I never saw any.

Ques. How far was it from the south of the switch stand *was it* to where the first car was over-turned?

Ans. I think about 90 feet.

Ques. You say there was no cars south of the switch stand for 90 feet?

Ans. No sir, only what was wrecked.

Ques. Were the wrecked cars all lying south of the switch stand?

Ans. Yes sir, all that I saw I think was there.

Ques. How far was it south from the switch stand to the nearest car that was wrecked that you saw?

Ans. I do not remember. It was 90 feet from the switch point. I think it was about three rail lengths from the switch stand to where the car was turned cross ways across the track.

Ques. Did you not state a moment ago that it was 60 feet from the culvert to where the cars was across the track?

310 Ans. No sir, I did not.

Ques. Well, what was the distance from the culvert back to where the first car was standing?

Ans. About 30 feet.

Ques. Was there any other cars along the side of the track between that and the switch stand?

Ans. T-o cars were standing cross ways of the track. Between these two cars and the switch stand the whole thing was wrecked. The whole ditch was filled. One car of wheat lay in the ditch *was filled. One car of wheat lay in the ditch* where the culvert was.

Ques. Was there any cars north standing there?

Ans. I do not know. I do not remember.

Mr. J. W. DEERING introduced for defendant-.

H. D. ALLEN, Att'y for Defendants:

Ques. Where do you live, Mr. Deering?

Ans. Princeton, Kentucky.

Ques. How long have you lived there?

Ans. About three years.

Ques. Where were you residing before you went to Princeton?

Ans. Caldwell County, Kentucky.

Ques. Are you now employed by the Illinois Central Railroad Company?

Ans Yes sir.

Ques. In what capacity?

Ans. Road Supervisor.

311 Ques. What Territory is included in that employment?

Ans. I go from four miles north of Evansville to Hopkinsville, over the Princeton Branch and over the Uniontown Branch.

Ques. Were you employed by that Company in 1903, in May?

Ans. Yes sir.

Ques. How was you then employed?

Ans. I was promoted to Supervisor of tracks on the 4th day of May.

Ques. How had you been employed previous to that?

Ans. Section foreman and extra gang foreman.

Ques. What has been your experience in observing track alignment and noticing its condition as to being safe to run trains over it?

Ans. I have done work on tracks and had charge of tracks for about 27 or 28 years.

Ques. Did you have occasion to notice this track here prior to the wreck?

Ans. I passed over this track on the 4th day of May?

Ques. How did you get over it?

Ans. On the train.

Ques. What part of the train?

Ans. On the rear platform.

Ques. Why were you on this rear platform?

Ans. I was making an inspection of the road, we went to Evansville and came to Princeton, and went to Hopkinsville and back to Princeton.

Ques. Is that — usual way of inspecting the road?

Ans. We are usually on the hand car. My instructions were to go over on the hand car.

Ques. Did you, upon that occasion observe the track at
312 Harding?

Ans. Yes sir.

Ques. Did you notice its apparent condition?

Ans. It was my object in seeing the track, I did not see anything wrong with the track?

Ques. What was the apparent condition of that track?

Ans. It was good.

Ques. I will ask you with regard to the condition as to that part of the track or road being dry or wet, as you noticed it at that time?

Ans. I think it was dry.

Ques. Did you observe any giving or rising feeling of the rails or track at that place?

Ans. No sir, I did not.

Ques. State whether or not the track was at the time in a reasonably safe condition for the operation of trains?

Plaintiff objected to question and answer, which objection was sustained by the Court to which ruling of the Court the defendants excepted, and made avowal that witness if permitted to answer would say that the track was then in a reasonably safe condition for the operation of trains.

Ques. Were you there after the wreck?

Ans. Yes sir.

Ques. How soon did you reach there?

Ans. I think about 11:30 or 11:40 after the wreck when I got there.

Ques. Tell the Jury whether you saw the beginning of the derailment, if so, where it occurred?

Ans. I came up on the wrecker, and as soon as we got there we got

off the train and come around on the west side up to about
313 the switch, and got on the track at the switch and come back towards the depot to where I found a part of the mule.

Ques. Tell where that mule was and part of it you found there?

Ans. The mule, that is the fore shoulders and the head of the mule was lying out to one side of the track. I saw the wheel marks as I come down from the — on the ties, and I followed these marks back to where they began or stopped, and a part of the mule was laying out on the left side on the outside of the curve, about 12 or 15 feet from the rail, and I noticed some blood on the ties. Right where this blood was the wheel marks was on the ties, that showed me that the wheel went over right there, there was one wheel mark on the outside of the rail?

Ques. Was there any on the inside between the rails?

Ans. Yes sir, one.

Ques. What was the distance between what you took to be wheel marks as they passed down on the tracks?

Ans. It showed to be the gauge of the wheel which is 4 feet and 8 inches.

Ques. What wheel do you mean?

Ans. The truck wheels of the engine.

Ques. What are truck wheels?

Ans. They are the wheels under the front of the engine, some engines have two wheels and some has trucks which have four wheels, the same as under the ends of the box cars.

Ques. What is the purpose of the truck wheels?

Ans. They lead the wheels and hold the engine on the track.

Ques. Did you make this diagram which we have marked "A"?

Ans. Yes sir.

314 Ques. Is it correct?

Ans. It is a rough sketch.

Ques. You mean by that that it is not drawn by scale?

Ans. No sir.

Ques. Tell the Jury where you noticed these truck tracks?

Ans. At this point right here, first, that is my idea. This tie was the first tie that was marked by the flange of the wheel. This mark here is the outside rail. This mark leads from the rail along up here, and does not go near as close to the end. This mark leads from this point here up to somewhere about here at this point, then turned in to the main rail until it gets to this lead rail, it showed that it hit this lead rail, this rail carried the wheel over. The wheel struck this lead rail and it shoved the wheel over.

Ans. Then as the engine came along here when it struck this lead rail, it carried the wheel further out from the main rail and took the engine right out over this bridge?

Plaintiff objected to question and answer. Plaintiff's objection sustained by the Court and defendants excepted and made avowal that witness would say that when the left truck wheels dropped off the ties the axle of the truck and engine dropped to the ties and swept them off clean.

Ques. Well, I will ask you this, when this inside wheel began to go there, what become of the outside wheel? What did these marks indicate?

Ans. *It dropped off from the ties.*

Ques. What did these marks indicate as to the course of the engine?

315 Ans. When this wheel hit the lead rail here, Right here is the heel of the switch, about this place right here at this point, the mark shows that the wheel dropped off, there was one or two ties about here, I believe, that was not marked, that showed that this wheel left here, left the ties altogether.

Ques. From where the last mark appeared on the tie, what was left of the track beyond to the south?

Ans. Nothing left.

Ques. You say this wheel mark come from this place here?

Ans. Here, I think the wheel dropped off here.

Ques. From this bent rail here on south, all was just swept off?

Ans. Yes sir.

Ques. How wide is it between these rails?

Ans. Four feet and eight and one-half inches.

Ques. How wide were the truck wheels and the engine wheels?

Ans. They are made to run on the track, 4 feet and 8½ in. gauge.

Ques. Now, then, if this wheel here reached the point there indicated, how far was it from the east point of that tie. From this last marked tie, where this lead rail crosses to this last marked tie, how far is it from that point to the east end of the tie?

Ans. I could not say exactly.

Ques. Your opinion, your best judgment?

Ans. Well, I think it would be about 24 or 26 inches.

Ques. Did you notice the condition of these ties after the wreck?

Ans. Yes sir.

Ques. Just tell the Jury?

316 Ans. From the heel of this switch the track was not hurt except this wheel mark across here.

Ques. What was the effect of that on the ties?

Ans. They just showed a plain mark there from this point along on the end of the tie from the heel of the switch to this point. This part here was all swept up.

Ques. I will ask you the condition of the rails, and the ties, as to the condition of the ties in the ground?

Ans. The ties seemed to be all right, they were in proper place.

Ques. Was there any mud on them?

Ans. I did not see anything of that at all. I could see a place along there where this wheel went off where some mud had been but not enough to make the track unsafe.

Ques. What was the condition of the rails at their joining?

Ans. All right, and properly bolted up and spiked down.

Ques. What was the condition of the angle bars holding these rails together at the end?

Ans. I did not notice any defects in them at all.

Ques. To what extent of space did this wreckage reach here south of the switch rails on either side of the track?

Ans. Well, here is the bridge, and a car of wheat was laying just south of this bridge on the west side, and I think that was the nearest car to the switch, south of that they were all piled up every way.

Ques. Could you see, or did you observe, or did you make any examination as to the course the engine took on this track after leaving the switch rail?

Ans. I saw where the marks left the ties, and out here the end of this bridge was torn down and the head of the engine was laying over near the fence; the back part of the engine was laying
317 to the south.

Ques. What was the condition of that road bed as to being dry or solid? When you saw it there?

Ans. It was dry. We piled freight all along there. This little bridge was filled with wheat. We shoveled the wheat up.

Ques. What was the condition of the ground outside of the road bed?

Ans. We had freight piled all along on each side of the track from this little bridge on south; I expect we carried the freight over 100 yards south, we had freight piled all along there; it was dry.

Ques. What was the condition along here on the west side of the track?

Ans. I think it was dry there.

Ques. What was the condition of the east side of the track from where the mule was seen to where the switch rail was?

Ans. It was dry.

Ques. There was no cattle guard, I believe across here; is there any cattle guard between the corner of the fence on the west side of the track; just west of the depot, between that corner and the railroad track?

Ans. No sir.

Ques. What was this piece of ground used for, represented upon this map, laying south of the public road, along the line of the railroad track?

Ans. It is for station purposes; used for loading and unloading freight. A car of freight in here sometimes is unloaded, and people are loading another car there?

Ques. That is used by the farmers around in that neighborhood.

Ans. Yes sir, I have seen as many as two cars of tiling
318 emptied there.

Ques. What was the condition of this ground on the n[illegible] side and on the west side of the public road?

Ans. That is also used for station purposes. From the — just north of the road.

Ques. How long has that been used for that purpose?

Ans. Ever since I knew the road, about three years.

Ques. Is it for the convenience of the public there to use this piece of ground?

Ans. Yes, for they have not fenced there.

Ques. Did that ever need fencing there?

Ans. Yes, it did.

Ques. Did you know whether or not, they used the part of the premises there that was not connected with this station?

Ans. Yes, I think so, our line of right-of-way runs somewhere along here, this along here belongs to farmers left there for their use. Up here about at this point, I think strikes the line.

Ques. What is this corner in here? Then from the corner of the fence on the west side of the track north of the public road to the corner of the fence near the Depot, is the line of the Company's right-of-way, or near that?

Ans. Yes sir.

Ques. What is the width of the right-of-way?

Ans. I think it is 40 feet from the center of the main track.

Ques. And this is all used here for loading and unloadin*d*, and shipping stock and other freight?

Ans. Yes sir, whatever the farmers have shipped to them or what they ship from here, in loading and unloading they use this ground.

319 Ques. Have you had occasion to notice these ties recently?

Ans. I notice them, yes sir, I notice them every time I go over the road.

Ques. How often did you go over that road?

Ans. I have no certain time to go over the road, sometime I go over there every day and sometime I miss a day or so, if a piece of work keeps me all day. This last summer I was over that part of the track almost every day.

Cross-examination.

By JOHN G. MILLER, Att'y for Plaintiff:

Ques. Regarding this Station, there is no Agent kept there is there?

Ans. No sir, there is no agent there.

Ques. This is a mere flag station is it not?

Ans. Yes sir.

Ques. There is no ware house or ticket office or anything of that sort there, is there?

Ans. No sir, there is a depot there.

Ques. Is that not a fact that this is an open Depot that stands open all the time, unoccupied by any one or anybody all the time?

Defendants objected to question and answer. Objection of Defendants sustained by the Court, and Plaintiff excepted.

Ques. Is that not an old building?

Ans. I do not think it is. The building is in good shape except the window lights.

Ques. Mr. Deering, did not you know that there was a hole burned out right in the middle of the floor?

Ans. No sir, I did not know that.

320 Ques. Is that building used for anything whatever?

Ans. I do not know.

Ques. Is there any place to sit down?

Ans. I could not tell you, it is not my business to look after such things.

Ques. Did you say that the railroad used that open space as indicated by these marks and lines?

Ans. I did not say they used it.

Ques. Well, what is it there for?

Ans. It has never been closed up.

Ques. It could be closed up.

Ans. I could not say.

Ques. I want to ask you now about these marks that you said was along next to the lead rail until it got within about 26 inches of the outer rail of the main track; what was it you said was 26 inches?

Ans. I said it was 24 or 26 inches from this lead rail to the end of the tie, on the left hand side going south.

Ques. Did you find any mark along on the lead rail, how near did it go with the outer rail of the main track?

Ans. You mean that mark I saw on this lead rail from where the wheels first come in contact with it, south.

Ques. I simply asked about the mark; how far along on that lead rail did the mark go?

Ans. Will you show me on the map just what you mean?

Ques. I mean this, you stated that there was a mark on the outside of the outer rail cut on the ties; then you stated that there was a mark on the inside of the inner rail on the inside; this mark comes down the track; how far did it follow the lead rail?

321 Ans. It struck the lead rail here at the south end of the frog and stayed on the outside of that lead rail.

Ques. Then you mean to say that this mark followed the lead rail down to the other rail, from the outside of this rail, right against it; where did it cross the lead rail?

Ans. I could not say where it crossed.

Ques. Where did it go?

Ans. I could not tell where it went after it got all torn up.

Ques. That was an end to the road here?

Ans. Yes sir, the rest was swept away.

Ques. Do you know a flange mark when you see it?

Ans. I think I do.

Ques. It makes a different mark from what any other instrument would make?

Ans. It would not make a different mark from what any other instrument would make that was the same shape.

Ques. You had how much track in charge at the time of this accident; how many miles.

Ans. At the time of the accident, 154 miles, and I had passed over this track on the passenger train two or three days before this accident, and then went back on the same day, three or four days before the accident.

Mr. F. J. DURBIN introduced for defense.

By JNO. W. LOCKETT, Att'y for Defendants:

Ques. Mr. Durbin, were you the conductor of this train that was wrecked on the 7th day of May, 1903, at Harding Station?

Ans. Yes sir.

Ques. At what speed were you going at the time of the wreck?
Ans. 25 miles per hour.
Ques. State if that was an unusual or unsafe rate of speed?
322 Ans. No sir.
Ques. Did you remain there the next day while they were clearing the tracks?
Ans. I was there until two o'clock with the exception of what time I come back to Morganfield to notify the Superintendent of the wreck.
Ques. Did you make any examination of the track there?
Ans. No sir, not particularly.
Ques. Did you know how many cars were in the train?
Ans. 15.
Ques. How many were wrecked?
Ans. I think nine.
Ques. That left, according to your recollection, six cars that were not wrecked?
Ans. Yes sir.
Ques. Where were these cars when you got off the train?
Ans. The Caboose stood right in front of the Depot, right square in front of the Depot.
Ques. Where were the other cars?
Ans. They were south of that.
Ques. Did you observe where this mule lay that night?
Ans. After I came back from Morganfield, I looked around, I did not look around at the time of the wreck.
Ques. State where these cars remained on the track with reference to the point where you saw the carcass of the mule?
Ans. To the best of my recollection, there were two cars, a little over two cars south of the mule.
Ques. What was the condition of that track that day; did you examine it?
Ans. Not particularly; I looked in order to make out my report.
Ques. What was the condition of the track on which these two cars stood.
Ans. I did not pay any particular attention to it.
323 Ques. Did you see any marks of any wheels after they had left the rails?
Ans. At the point where I saw a part of the carcass of the mule, I saw marks.
Ques. How far did you see these marks?
Ans. They went down there nearly to the switch.
Ques. How far were they from the rail on the west side and on the east side of the rail?
Ans. They first begin right close to the rail, and went down and then came back towards the rail and then went out and went off; they come near the rail again and then went off again from the end of the ties.
Ques. How often had you been over the road Mr. Durbin, for some time prior to this wreck?
Ans. I passed over two and three trips a week.

Ques. What was the last time before the wreck that you had gone over the *wreck?*

Ans. I went up the morning before.

Ques. On the morning of the 6th of May and this wreck occurred on the 7th?

Ans. Yes sir.

Ques. What was the condition of the track when you went over it the morning before?

Ans. It was all right as far as I could tell.

Ques. Did the track have any depressions in it?

Ans. I was not looking for them. It rode along the same as it did anywhere else. I never notice the condition of the road.

Ques. What hour of the night did this wreck occur?

324 Ans. One o'clock.

Ques. Explain to the Jury, the orders given you and the Engineer, and what authority each of you have in running the train?

Ans. We had no orders, that night, only our rules is that when we left the terminal station we take our orders from the — card. If we have no orders and the — card says "We have no orders for train No. 355, that is sufficient, and it gives us authority to go on. We have to keep out of the way of all trains of a superior class.

Ques. You are supposed to know that?

Ans. The time card tells us that.

Ques. What authority has each of you, with respect to the moving of a train?

Ans. We both hold equal responsibility. If one or the other violates the rules, then the other must use his best judgment in managing the train.

Ques. Did you give Mr. Sheegog any special orders about the running of that train that night?

Ans. No sir.

Ques. Did you give him any orders at all.

Ans. No sir.

Ques. After you and the Engineer received your — card, who had the control of the engine and the running of the train?

Ans. The engineer runs the train. Of course, if he run the *the* train recklessly and did not obey the conductor's signals, the next time he stops, you have the authority to fire him and telegraph in for another engineer.

Ques. You had no orders at that time?

325 Ans. No sir.

Ques. You were not violating any rules of the Company?

Ans. No sir.

Cross-examination by JOHN G. MILLER:

Ques. You spoke of that mark on the end of the ties beginning about where the piece of the mule lay; how far out did it finally extend to the end of the ties, how far from the rails?

Ans. I do not know what the distance is from the rail to the end of the tie; it was out very close to the end of the ties about 12 inches.

Ques. How close back to the rail did it go?

Ans. About four or five inches, maybe a little closer.

Ques. It got back then to within about 1/3 of the distance of the tie?

Ans. Well, a little closer than that.

Ques. Where is the flagman that was on the train with you?

Ans. I have not seen him since a month after the wreck.

Ques. He was discharged was he not?

Ans. I could not say.

Ques. He is not here as a witness, is he?

Ans. I have not seen him.

Ques. Do you know whether he is now in the employ of the Company?

Ans. No sir, I do not.

Ques. You say that 25 miles an hour is about the regular rate to run a freight?

Ans. Our time card gives us the privilege of running 25 miles an hour. Of course, we have our regular schedule time, 25 miles an hour was the rate that we liked to run if we were allowed to
326 do so; when we had a special we were then allowed to run at the rate that we thought safe and not dangerous.

Ques. How long had you been running over that track?

Ans. Eight years.

Ques. Have you ever run there when going faster?

Ans. Yes sir.

Ques. Have you ever been an engineer?

Ans. I was a long time ago.

Ques. You know something about the engine and head lights and everything of that sort, do you not?

Ans. Well, yes sir.

Ques. These trucks are what they call the head light trucks, the head light sets on them.

Ans. Yes sir.

Ques. Is the head light made with a — in the concave shape.

Ans. Yes sir.

Ques. How does the head light fall as regards to the track?

Ans. Well, it shows out ahead, probably 100 or 200 feet in front of the engine, according to the head light, whether it is clean or dirty or is a good one.

Ques. If it is a good clean head light?

Ans. Some engineers say they can see three or four telegraph poles.

Ques. Suppose you are upon a curve; along upon this curve, where would the head light fall?

Ans. The rays, of course, would go off to the left of the
327 track, according to the curve. When it curves to the right as that does, if would fall out to the left.

Ques. Within about what distance can a train be stopped running at a speed of 25 miles an hour?

Ans. If you have good air, you ought to stop the train that we had at about 2500 feet.

Ques. Did you not have 17 cars in that train?

Ans. We had 17 out of Henderson and put two out here at Morganfield.

Ques. I understood you to say, Mr. Durbin, that your Caboose stopped in front of the Depot?

Ans. Yes sir.

Ques. I will ask you whether or not, it is a rule of the Illinois Central Railroad Company, that the train is in charge of the Conductor?

Ans. It is in charge of the Conductor, so far as taking on cars and stopping at stations.

Ques. Otherwise you are both in charge?

Ans. Yes sir, if he comes through Morganfield here and does not know whether I want to stop or not, he whistles for a signal, then if I want to stop I give him the proper signal.

Ques. If the Conductor knows of a bad place in the road and wants the train to stop at that place, what does he do?

Ans. When the Conductor knows of such a bad place as that, he notifies him to stop.

Ques. In what way do you notify him?

Ans. Signal to stop.

Ques. In other words, he must take orders received from the Conductor?

Ans. Yes, if it does not conflict with the rules of the Company.

328 Ques. If he does not stop?

Ans. I have to set brakes and try to stop him, and report him to the proper officials.

Ques. The Conductor can set brakes?

Ans. Yes sir.

Ques. How long, did you say you have been on the road?

Ans. About 30 years.

Ques. You think you know a safe track when you see it.

Ans. I know it when I ride over it.

Ques. If the ties are just laid on the top, and the road not ballasted, and had worked down into the earth one-half or two-thirds of the ties in muddy water, and the ties were sloshing the water up on each end, would you consider that a safe track?

Ans. I would not consider that a safe track for good speed.

Ques. Would you consider that a safe track for any trains to run 25 miles an hour in passing over it?

Ans. I would not want to ride over it.

Ques. Suppose the track is not ballasted, and the cow catcher stands four inches above the rail, I wish to ask you if it would not be 16 inches from the cow-catcher down to the ground between the rails?

Ans. I believe they consider the tie 6 inches, and the rail 4, that would only make 14 inches.

Ques. Suppose there is a space of 14 or 16 inches between the cow-catcher and the pilot, and an animal is standing in there on the earth and a train strikes it running 25 miles an hour, with the kind of ballast that was on this road, do you think it would knock it down or not, or knock it off?

329 Ans. Well, I do not know that I could answer that intelligently, because it has been done both ways.

Ques. I will ask you if it would not be more likely to knock it down than if the track was properly ballasted?

Ans. Yes sir.

Ques. I will ask you whether or not you would consider it dangerous to run a train over that character of track at that rate of speed?

Defendant's objection sustained by the Court, and Exception made.

Ques. In other words, if the track had been in proper condition at that place, I will ask you whether or not, in your opinion, that train would have knocked that animal off?

Court objected to Question and Exception reserved.

Plaintiffs avow, that witness would state and it is true that the engine running at that rate of speed, and with the track in proper condition, it would have knocked the animal off.

Ques. What was the weight of that engine?

Ans. I believe it was considered a 90 ton engine. I do not know much about the weight of engines.

Ques. How long did you say, you had been running over that road, Mr. Durbin?

Ans. About six years.

Mr. Geirge Buchanan re-called for Plaintiff.

John G. Miller, Att'y for Plaintiff:

Ques. Mr. Buchanan, have you since yesterday, made an investigation as to how many of the ties that were marked by the train in that wreck remain there now?

Ans. Yes sir.

330 Ques. How many are marked, and how many are not marked?

Defendant's objection sustained, and exception reserved.

Ques. Well, Mr. Buchanan, just simply state what you did there this morning, and tell the Jury what you found?

Ans. I went and counted the ties from the first evidence that I have of the flange mark on the ties to the point of the switch rail, the rail leading from the switch on the west side of the main track, 112 in all, from where I first saw evidence of the flange mark on the ties, and 66 of these ties was all that I could find with the flange marks on; 36 where you could tell that was not marked; that left a difference of 10 ties that I was not certain about, if they were marked, I could not see the mark. Mr. Rudd was with me, and one would count the marked ties, and one the unmarked ties; we counted them three times.

Ques. Did you put down the numbers at the time?

Ans. Yes sir.

Ques. When did you do that?

Ans. This morning?

Ques. Included in that 112, were short ties or long ties?
Ans. Both short and long ties.

Cross-examination by JOHN W. LOCKETT:

Ques. You counted 112 ties, you say?
Ans. Yes sir.
Ques. In all?
Ans. Yes sir.
Ques. You found 66 you say marked on?
Ans. Yes sir.
Ques. And 36 you did not find any marks on?
Ans. Yes sir.
331 Ques. And 10 you did not know whether had been marked or not?
Ans. I could not tell whether they were marked or not.
Ques. Between that point and on to the end of this rail, you say you counted 112: That was ten more than you can account for?
Ans. Yes sir.
Ques. You went between the heel of the switch point and the switch point?
Ans. Yes sir. Right here, I think that is about where the point of the rail runs out.

JOHN G. MILLER, Att'y for Defendant:

Ques. How many of these going beyond the point, of these ties *ties* were there that you counted beyond the point, how many were marked and how many were not marked, in counting all the long ties?
Ans. I did not pay any attention to that. That was as far as I counted, 112, that run from the point of this rail right opposite the switch stand on down to the heel of the switch point.

Mr. Moss RUDD recalled for Plaintiff.

Mr. JOHN G. MILLER, Att'y for Plaintiff:

Ques. Were you with Mr. Buchanan, when these ties were counted this morning?
Ans. Yes sir.
Ques. Just tell exactly what you found on this track as to the marks, the ties that had been marked and not marked.
Ans. I counted the ties from the first mark there where the mule had been struck, and is marked on either side of it down to the switch point, the point of the switch rail, that is the switch stand sets on two long ties that go clear across the track, and from
332 the point where the mule was struck down to there, I counted, 112 ties to that switch stand.
Ques. How many were marked and how many were not marked?
Ans. I counted both ways: I counted 66 that were marked, and the unmarked ones, 36, and then there was some ties that were doubtful, I could not tell, I was not positive about them as to whether

they were marked or not. Some marks were as plain as right after the wreck.

Ques. Tell the Jury of any other observation you made there about counting them.

Ans. I counted them from the place where the mule — on down to where I thought the train left the track.

Ques. That was how many?

Ans. 110 or 112.

Ques. Now then, did you make any observation about any number, smaller number, down near the lower end? If so what was that?

Ans. 15 ties there, and nine of them were unmarked, down to the point of this track.

Ques. Where were these 15 ties?

Ans. Below where the whole thing left the track?

Ques. There was a difference in where the mule left the track and where the first mark of the flange?

Ans. Yes sir, the marks were on ahead.

Ques. How far ahead?

Ans. About 10 or 11 ties difference.

Ques. Where the whole thing left the track?

Ans. Below where the train left the track.

Ques. Below the switch?

Ans. No sir, this side of the switch stand.

333 Ques. The last 15 ties of this 112?

Ans. Yes sir.

Ques. You say that was where the whole thing was wiped out?

Ans. This part from there on was wiped out?

Ques. It has been stated here, Mr. Rand, that at the time of the wreck the dirt ballast was above the ties.

Court objected to question.

Ques. I will ask you if that track was ballasted or repaired five days before the wreck.

Defendants objected to question.

Ques. I will ask you whether or not they had ballasted that track after the wreck?

Court objected to answer as being immaterial.

And this is all the evidence that was heard in the trial of the cause.

STATE OF KENTUCKY, *County of Union, set:*

I, Virginia Phipps, certify that the foregoing sheets from 69 to 333 inclusive are a correct transcript of all the evidence given on the trial of the cause of R. W. Sheegog, Administrator of J. E. Sheegog, Plaintiff against Illinois Central Railroad Company and Others, Defendants, tried at the March Term, 1905, of the Union

Circuit Court, which evidence was taken by me in shorthand and transcribed by me.

334 Given under my hand this 29th day of March, 1905.

VIRGINIA PHIPPS,
Stenographer.

Attested and approved by me this March 29th, 1905, as a correct transcript of the evidence given in the above named cause.

J. W. HENSON, *Judge.*

335 STATE OF KENTUCKY, *County of Union, set:*

I, J. E. Miller, Clerk of the Union Circuit Court hereby certify that the foregoing sheets from 69 to 333 inclusive is the evidence taken and transcribed by Virginia Phipps, Stenographer, and certified to by her, and attested and approved by J. W. Henson, Judge, in the Cause of R. W. Sheegog, Administrator of J. E. Sheegog, Plaintiff against Illinois Central Railroad Co., &c., Defendants.

J. E. LILLY,
C. U. C. C.

336 Be it remembered that on the 10th day of November 1905, at a Court of appeals held at the Capitol at Frankfort, the following order was entered:

I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

Came the appellant and filed grounds, and moved the Court to grant an oral argument herein, which motion is submitted. (The grounds for an oral argument, mentioned in foregoing order is as follows.)

Court of Appeals, September Term, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL., Appellant-
vs.
R. W. SHEEGOG, Adm'r J. E. Sheegog, Appellee.

Motion and Grounds for Oral Argument.

Appellants ask for oral argument of this case because it involves questions of novelty which cannot be properly presented without oral argument.

Appellee sued the Illinois Central Railroad Company, Chicago, St. Louis and New Orleans Railroad Company and F. J. Durbin who was a conductor of a freight train which was derailed during the night. The decedent was the servant of the Illinois Central Rail-

road Company as engineer and was no servant of the Chicago, St. Louis and New Orleans Railroad Company.

The Illinois Central Railroad Company filed a petition for removal upon the ground of separable controversy which was
337 denied by the State Court which retained jurisdiction and after an extended trial rendered a judgment upon a verdict for over $8,000.00. This case in some of its features resembles the case of Illinois Central Railroad Company *v.* Manion which is now under submission, also the question as to what is required of the Railroad Company in the discharge of its duties to trainmen, as to repair of track, fencing of track, keeping it clear of obstructions, etc., etc. and what risk is assumed by the trainmen.

This case also involves the difficult question of puntitive damages for gross negligence, the court having instructed that a jury might find punitive damages where there was no intentional wrong and as appellant conceives could by no possibility be any gross negligence.

This case was tried before a different Judge from the Manion case, and, although, some of the points involved are the same, the different evidence, different allegations in plaintiff's petition and different instructions of the Judge make a different case.

We attach copy of Brief in the Manion case indicating some of the questions—but not all the questions raised in this case.

TRABUE, DOOLAN & COX,
Att'ys for Appellant.

And afterwards towit on the 14th day of November 1905 at a Court of Appeals held at the Capitol at Frankfort, the fol-
338 lowing order was entered towit:

I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

The Court being sufficiently advised, appellant's motion for an oral argument is overruled, and on motion appellant is given 30 days' extension of time to file brief.

And afterwards on the 15th day of November 1905, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered towit:

Q. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

This case is ordered to be submitted.

And afterwards on the 1st day of May 1906 at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered,

I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

Came the appellant and tendered and moved to file an additional transcript of the record, herein, and the Court being sufficiently advised, said motion is passed for the present.

And afterwards at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered towit:

339 I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

Came appellant and filed notice, and renewed motion, to file an additional transcript herein.

(The notice mentioned in foregoing order is as follows.)

Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
R. W. SHEEGOG'S ADM'R, ETC., Appellee.

Notice.

Appellee will take notice that appellant will on Thursday, May 10th, move the Court of Appeals to file certified copy of Instruction No. 1 from the Union Circuit Court as certified by the Clerk of that Court in this case.

TRABUE, DOOLAN & COX,
For Appellant.

We acknowledge service of this notice upon this day, May 7, 1906.
HENDRICK & MILLER,
Att'ys for Appellee.

340 And afterwards on the 11 day of May 1906, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered.

I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

The Court being sufficiently advised, appellant's motion to file additional transcript is sustained, and said additional transcript is ordered filed as part of the record.

(The additional transcript mentioned in foregoing order is as follows.)

Union Circuit Court, March Term, 1905.

Presiding, Hon. J. W. Henson, Judge.

R. W. SHEEGOG'S ADM'R, &c., Plaintiffs,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Instructions.

No. 1.

Gentlemen of the Jury the Court instructs you to find for the Defendant. The Chicago, St. Louis and New Orleans Railroad Co., and the Defendant F. J. Durbin, and you will also find for the Defendant. The Illinois Central Railroad Company, unless you find for the Plaintiff against said Defendant under the following instructions.

STATE OF KENTUCKY, *County of Union, set:*

341 I, J. E. Lilly, Clerk of the Union Circuit Court for the State and County aforesaid do hereby certify that the foregoing is a true and correct and full copy of instruction No. 1, given by the Court to the Jury in the trial of the cause of R. W. Sheegog, Administrator of John E. Sheegog against Illinois Central Railroad Company, F. J. Durbin and Chicago, St. Louis and New Orleans Railroad Co., had in the Union Circuit Court at its March term 1905, that said instruction was filed in said cause together with instructions No-. 2, 3, 4, 5 and 6 given by the Court and together with them delivered to the jury in said cause and taken by them to their room and returned by them into Court with their verdict in this cause, finding against The Illinois Central Railroad Company in the sum of $8,250.00, and is with the other said instructions Nos. 2, 3, 4, 5 and 6 a part of the record in the said cause now on file in my office.

Given under my hand as Clerk of the Union Circuit Court this April 26th 1906.

J. E. LILLY,
Clerk Union Circuit Court.

Be it remembered that at a Court of Appeals, held at the Capitol at Frankfort on the 20th day of June 1907, the following judgment was entered towit:

342 ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
JOHN E. SHEEGOG'S ADM'R, Appellee.

Appeal from Union Circuit Court.

The Court being sufficiently advised, it seems to them, there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered certified to said court. (Whole Court Sitting.)

It is further considered that the appellee recover of the appellant his costs herein expended.

And on said date the Court delivered the following opinion.

343 Kentucky Court of Appeals.

(To be reported) June 20, 1907.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
JOHN E. SHEEGOG'S ADM'R, Appellee.

Appeal from Union Circuit Court.

Opinion of the Court by Judge NUNN:

This action was instituted by the administrator of John E. Sheegog who was killed in the derailment of an engine and train of cars on which he was engineer at the time. The Chicago, St. Louis & New Orleans Railroad Company, the owner and lessor of the road, Illinois Central Railroad Company, the lessee, and F. J. Durbin, the conductor in charge of the train, were made defendants to the action. It was alleged in the petition, in substance, that on the seventh day of May, 1903, his intestate was in the employment of the defendant, Illinois Central Railroad Company, as an engineer on one of its trains, and while in the performance of his duty, as such engineer, the train upon which he was engaged was, through the joint and gross negligence and carelessness of the three defendants herein, derailed and his intestate thereby instantly killed.

In the petition the negligence and concurrent negligence of
344 each of the defendants is alleged with some particularity. We copy from it as follows:

"At the time the defendant, the Chicago, St. Louis & New Orleans Railroad Company was the owner of said roadbed, fences, right-of-way, trestles and bridges where said accident happened, and the Illinois Central Railroad Company was the lessee of said railroad property and premises, and was the owner of the engines and cars, trains and appliances by which the said intestate was killed, and was operating said road, trains and engine, and the defendant, F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter Railroad Company, and in charge of said train and engine and appliances, and the said intestate was required to obey and was obeying and acting under the orders of the said defendant, F. J. Durbin.

The plaintiff now says, that by the negligence of both of said companies, defendants hereto, the said roadbed, rails, track, cattle-guards, ties, fence and right-of-way, of the said railroad was allowed to be and for a long time had been in a weak, rotten, ruinous and defective and improper condition, and by the negligence of the Illinois Central Railroad Company, its engine and cars were, know-

ingly allowed to be and remain in an improper, defective and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road, premises and cars of the defend-
345 ants were known to the said defendants, and at the time of this said wreck and accident, same were being operated in a careless manner by all of said defendants; and the said Durbin, by his negligence in running, ordering and directing said train contributed to the cause of said accident; and the plaintiff says that the negligence of the defendant (C. St. L. & N. O. R. R. Co.) in its maintenance of its tracks, road bed, engine, cattle guard, rails, ties, fences, etc., as above set out, and together with the negligence of the said Illinois Central Railroad Company, in directing and permitting its engine, cars and road to be operated while in a defective and dangerous condition, and the negligence of the said conductor, in ordering and directing the running and management of said train, and in failing to give proper directions all together jointly caused said wreck and killed the plaintiff's said intestate," etc.

that his intestate was a young, vigorous man, an excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects and making and saving large sums of money, and by the joint gross negligence of the defendants in thus causing his death, the plaintiff has been damaged in the sum of $25,000.00." The plaintiff further alleged that his place of residence, as well as that of his intestate, to the date of his death, was in Central City, Muhlenberg county, Kentucky; that the defendant, Illinois Central Railroad Company, was a corporation organized under the laws of the state of Illinois and the defendant, Chicago, St. Louis & New
346 Orleans Railroad Company, was a Kentucky Corporation organized under the laws of this state, and the defendant, F. J. Durbin, was a resident and a citizen of the state of Kentucky.

The defendant, Illinois Central Railroad Company, filed its petition and bond for removal of the case to the Federal court, alleging a separable controversy between it and appellee determinable between them without either of its co-defendants, and alleging joinder of its co-defendants in fraud of Federal jurisdiction. The court refused to transfer the case. Then each of the defendants filed a separate answer denying all material allegations of the petition.

The issues being completed a trial was had which resulted in a verdict for appellee as against the Illinois Central Railroad Company for $8,250.00; and on peremptory instructions the jury found for the other two defendants. The Illinois Central Railroad Company appeals, and assigns the following reasons for reversal: First—The admission of incompetent and the rejection of competent evidence. Second—Er-oneous instructions to the jury. Third—The refusal of the court to give a peremptory instruction to find for it. Fourth—The refusal of the court to surrender jurisdiction to the Federal court.

The third assignment for reversal necessitates our stating the substance of the evidence. Appellee's testimony conduces to show the following facts. The deceased was a young man, about twenty-

nine years old, sober, industrious, of good habits, strong and in good health, that he had been following the avocation of railroad engineer for about eight years, that his run was from Central City, his home, to Paducah, Kentucky, that he was killed on ap-
347 pellant's line of road which connects with the main line at Princeton, Kentucky and extends to Evansville, Ind. Known as the Ohio Valley line. The deceased had only made about two trips on this line, both at night; one about three weeks before and the one on which he was killed.

When the train reached a flag station called "Harding" in Union county, Kentucky, the engine struck a mule, turned over and the deceased was instantly killed. No one lived at this station. A public road passes by it, crossing the railroad at right angles. From this public road running south, the way the train was going, a distance of about one hundred and fifty or two hundred yards to a culvert, the road is fenced on either side; but there were no cattle guards at the public road and loose stock according to the evidence, passed into this cul-de-sac and grazed on either side of the track. The proof shows that this mule came upon the track in front of the engine and made a few jumps south, and then was struck by the engine and cut *into*, leaving the front part on the left of the track between the ends of two ties. From this point the evidences of the small wheels that support the pilot were noticed on the ties for fifteen or twenty feet, and from that point the large drive wheels of the engine were thrown from the rails and from that point to twenty or thirty feet beyond the culvert the ties, rails and every thing were swept clean.

The proof shows that the engine was fitted with a stub pilot instead of with a standard pilot, that the stub pilot stood four or more inches above the rails and had but the slightest slant, that the standard pilot was very slanting, extended out in front of the engine four or five feet and rested only two inches above the rails and that,
348 with it in use, when the track is properly constructed and reasonably well ballasted, it was almost impossible for stock when struck to get under the train; the pilot would knock them off. The testimony showed, without much contradiction, that the portion of the track described had never been ballasted, that the ties were laid on dirt, that much of it had been washed away so that it did not come to the top of the ties, that a track is properly ballasted when crushed stone, gravel or cinders are tamped under, upon and between the ties, and up to a point above even with the top of the rails, (and such was the condition of the track at each end of this cul-de-sac) and that this track as constructed left about fourteen or sixteen inches from this stub pilot to the dirt between the ties, which made the chances of clearing the track of stock when struck by the pilot doubtful.

It was proven by some of the section hands on the road, that this part of the track had been in that condition for a long time, and the general superintendent of the road had had his attention called to it, and had been requested to furnish material to put that part of the road in reasonably safe condition; but had failed to do so

up to the time of the accident. They also stated that the track as laid would often get out of alignment, and that they were compelled, by the use of jackscrews, to force it back. Many witnesses testified that they had been at this point when trains passed and saw that the track was insecure, that engines and cars would wabble in passing over it, would sink in some places and rise in others, would mash some ties down and water and mud would gush up over them,
349 that when trains had passed the rails would straighten and raise some of the ties two inches from the earth. Many witnesses examined the conditions there after the wreck, and about all of them testified that there were many rotten ties, some of them stated that more than one-half were rotten, that some of them had rotted into two pieces, and so rotten that they could pull the spikes from them with their fingers.

The most serious complaint made by appellant to the instructions is that the court gave an instruction on punitive damages. Section 241 of the constitution, and section 6 of the statutes provides:

That when ever the death of a person results from an injury inflicted by negligence, damages may be recovered for such death, and when the negligence is gross punitive damages may be recoverd.

It is certain from the evidence that those in charge of the railroad knew of its defective condition; and it was gross negligence on appellant's part to direct or suffer its trains to be run, from twenty to thirty miles an hour at this point, knowing also that they had failed to put cattle guards at the public crossing and that stock might be expected in this cul-de-sac at any time. Appellant's conduct in this evidenced a reckless disregard of the rights and safety of those whose business required them to travel over this road. There were no errors in the instructions prejudicial to the substantial rights of appellant; nor did the court commit any prejudicial error in the admission or rejection of evidence.

The main contention of appellant is that the court erred in refusing to surrender jurisdiction to the Federal court. There
350 is no question but that the petition of appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants; This is conceded. Upon the filing of the petition by appellant for removal of the case to the Federal court, it was the duty of the judge of the state court to determine from the petition and record, whether or not there was presented a Federal case, if so it was his duty to proceed no further, but to remove the case to the Federal court, and it was the duty of that court to hear the proof on the jurisdictional facts, or questions raised by the petition for removal, and determine whether the Federal court or State court had jurisdiction of the case.

In the case of Crehore *v.* Ohio & Mississippi Railway Co., 131 U. S., 240, the court, Justice Harlan delivering the opinion, said:

"If the case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of Congress, the jurisdiction of the Federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal."

In the same opinion the court further said:

"It thus appears that a case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable.

We say, upon its face, because 'the state court is only at lib-
351 erty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.'" (Meaning the Federal court)

See the following cases which announce the same rule, Stone *vs.* South Carolina, 117 U. S. 430; Stevens *vs.* Nichols, 130 U. S. 230; Phœnix Ins. Co. *vs.* Pechner, 95 U. S. 183; Powers *vs.* Railroad Co., 169 U. S. 92, and the following decisions of this state recognizing the same rule, McCabe's Admrx. *vs.* Maysville & Big Sandy Railroad Co., 112 Ky. 861; Rutherford *vs.* Illinois Central Railroad Co., 27 Ky. L. R. 397 and Illinois Central Railroad Co. *vs.* Jones, 26 Ky. L. R. 31, in this last case the court said:

"If both the State and Federal Courts could try the same facts as to jurisdiction, different conclusions might be reached, and unseemly conflict and confusions result. To avoid these, the Congress has wisely made the condition of the Federal Court's jurisdiction to depend upon the filing in the State Court in due time of a petition, in which, according to the unbroken current of the decisions of the Federal Courts construing the act, all necessary facts to show *prima facie* a right in the petitioner for the removal must be set out, not as conclusions of law; or, such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the State Court for the removal is made.

352 (Crehore *vs.* Ohio R. R. Co., 131 U. S. 240; Freeman *vs.* Butler, 39 Fed. 1 (opinion by Barr District Judge) Seddon *vs.* Allen, 132 U. S. 27; Smith *vs.* Horton, 7 Fed. 270; Amory *vs.* Amory, 95 U. S. 186; Weed Sewing Machine Co. *vs.* Smith, 71 Ill., 204, Chester *vs.* Chester, 7 Fed. 1; Burlington &c. Ry. Co. *vs.* Dunn, 122 U. S. 517; Railway Co. *vs.* Ramsey, 22 Wall., 322; Grace *vs.* Am. Central Ins. Co., 109 U. S., 278; Gold W. & W. Co. *vs.* Keyes, 96 U. S., 199; Corson *vs.* Dunham, 121 U. S., 421; Removal cases 100 U. S. 457; Yulee *vs.* Vose, 99 U. S. 539.)

The truthfulness of these facts may then, and not till then, be inquired into in the Federal Court. As the petition for the removal and the record in this case did not in our opinion state facts sufficient to confer jurisdiction upon the United States Circuit Court, that tribunal had not the right to inquire into their truthfulness, nor to hear evidence to the other facts not alleged in the record or the petition for removal, and by adding such evidence to the insufficient allegations find the needed jurisdictional facts."

The question now for consideration is did the court err in refusing a removal of the case to the Federal court. As stated, it is conceded that a joint cause of action was alleged in the petition of appellant against all three of the defendants. The Common Law distinction between different forms of action have been abolished by our Code

of Practice; and all persons who are liable for a wrong may
353 now be sued jointly in this state in an action to recover for negligence. See McCabe's Admrx. *vs.* Maysville & Big Sandy Railroad Co. *supra*. The petition for removal denies the negligence charged in the petition. This is not a jurisdictional fact under all the authorities. In an attempt to show that the Chicago, St. Louis & New Orleans Railroad Company was joined as defendant with it wrongfully, it was alleged in the petition for removal that the Chicago, St. Louis & New Orleans Railroad Company was employed to construct and lease to the petitioner its railroad mentioned in plaintiff's petition; and stated that it was so empowered by an act of the General Assembly of the Commonwealth of Kentucky, long prior to the adoption of the present constitution of the Commonwealth of Kentucky; which act of the General Assembly became a law on the 24th day of February, 1882; and that pursuant to such powers the Chicago, St. Louis & New Orleans Railroad Company, being the owner, leased to the petitioner all of the railroad mentioned in the petition, and parted with all dominion over it; and that your petitioner has since the lease (1897) continuously operated the railroad exclusively, and the lessor never at any time operated it.

Even if this plea could be made available, the petition was defective; it was an attempt to plead a private statute. Section 119 of our Civil code of practice provides:

"In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

The title of the act is not stated in the petition, nor is there any
354 attempt to state it. The contents of the acts is not stated, the petitioner only alleged its conclusions as to the contents, which were that the Chicago St. Louis & New Orleans Railroad Company had the power to construct and lease to the petitioner the railroad. The same remarks will apply to the alleged contract of lease, the contents of which is not stated in the petition, nor a copy filed. The conclusion was that the lease gave it dominion over the road and under same it operated the road. It is admitted that the Chicago, St. Louis & New Orleans Railroad Company was and is the owner of the road, that it still maintains its corporate organization and existence, but instead of operating the road itself directly, has bargained with the Illinois Central Railroad Company to run it for a compensation, as we must suppose, as the terms of the lease are not stated in the petition for removal. Even if the act and the lease had not been defectively pleaded, the result would be the same. The Chicago, St. Louis & New Orleans Railroad Company was given a franchise by the state and it therefor- assumed certain burdens, and under the constitution and laws of this state, it can not by a lease exempt itself from responsibility for the torts of itself and lessee. In the case of Lee *vs.* Southern Pacific R. Co., 38 L. R. A., 71, the court said:

"Where a statute authorizing leases contains no clause exempting in any respect the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses, etc."

Section 203 of the state Constitution is in these words:
355 "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

This court in construing this section of the constitution, in the case of McCabe's Admrx. *vs.* Maysville & Big Sandy R. R. Co., *supra*, said:

"The franchises of a corporation are its property. The declaration that these in case of a lease or alienation shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability; for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of the lessee. If the lease in question was made after the adoption of the Constitution, it would not exempt the lessor from liability * * * but if it was made before the adoption of the Constitution the result is the same?

In the same case the court again said:

"The defendant company, therefore, in reality still enjoys
356 the benefits of its charter, and can not be permitted to escape its corresponding obligations. * * *

A grant to a corporation of a right to lay out, construct and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the power of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise. Such grants are never made except at the request of the corporation. In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises except by an act of the legislature to that effect so distinct and unequivocal as not to be open to mistake. 'Nothing should be left to inference.' * * * 'The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it by the Legislature, clear evidence of a legislative assent
357 to such exoneration should be found.'"

It will be seen from the petition of removal that there is no allegation that the act authorizing the lease, even attempted to relieve the lessor from its primary responsibility to the public; and the court in the McCabe case continuing said:

" 'After conferring upon a corporation the right of eminent domain, with many other special privileges which the Legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the State can not be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs and defaults.' See, to the same effect, Balsey *vs.* Railroad Co., 119 Ill., 68, 8 N. E., 859, 59 Am. Rep., 784; Singleton *vs.* Southwestern R. R., 70 Ga., 464, 48 Am. Rep., 574; Tillett *vs.* Railroad Co., 118 N. C., 1031, 24 S. E., 111; Railroad Co. *vs.* Morris, 68 Tex., 59, 3 S. W., 457; Chollette *vs.* Railroad Co., 26 Neb., 169, 41 N. W., 1106, 4 L. R. A., 135; Parr *vs.* Railroad Co., 43 S.
358 C., 197, 20 S. E., 1009, 49 Am. St. Rep., 826; Pennsylvania Co. *vs.* Ellett, 132 Ill., 654, 24 N. E., 559; Stephens *vs.* Railroad Co., 36 Iowa, 327; Bower *vs.* Railroad Co., 42 Iowa, 546; Railroad Co. *vs.* Lee, 71 Tex., 558, 9 S. W., 604. * * *

If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except perhaps where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of the railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its tracks and station houses in safe condition? In truth we do not know of any duties of a railway corporation which are of a private character * * *'

By its acceptance of the franchise conferred by the State the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of
359 its franchise in the rents. For such grants are strictly construed, and, as against the public, are never extended by construction. In the case before us there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchise, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit."

But it is said that this responsibility of the lessor does not apply to the employés of the lessee of the road; that the lessor owed no

duty to them and that they are not members of the public in the sense used in the decisions on that subject.

It is true that the courts, in part have made this distinction; but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property; but holds the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses &c.

In the case of Swice's Admx. *vs.* Maysville & B. S. Ry. Co., 116 Ky., 253, this distinction was recognized to be the true rule.
360 The case of Charles A. Lee *vs.* Southern Pacific Railroad Company, 38 L. R. A., 71 appears to have been well considered and the authorities carefully collated. In that opinion the court said:

"In Nugent *v.* Boston, C. & W. R. Co. 80 Me. 62, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language:

'Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, &c., the charter company cannot, in the absence of stat-ory exemption, discharge itself of legal responsibility.' In Arrowsmith
361 *vs.* Nashville & D. R. Co., 57 Fed. Rep. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of East Line & R. R. Co. *vs.* Culberson, 72 Tex. 375, 3 L. R. A. 567, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employee of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The court held, and very properly, that such an action would not lie against the lessor company, and said: 'It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by

another company operating the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road.'

In all cases where a valid lease is found (or as in this discussion, where it is assumed), the lessor company owes no duty what-
362 soever as an employer to the operatives of the lessee company. The claim of relationship of employer and employee under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow servant, or of want and care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But, where injury has resulted to an employee of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employee may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employee and employer, or any relation of contractual privity, exists. As is said in Nugent *vs.* Boston & M. R. Co. 80 Me. 62, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company: 'Our opinion,
363 therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station house of the defendant which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor.' So, here, the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and tracks of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it."

This case is very similar to the one at bar, in which it was alleged and proven that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe road bed.

In the cases of the Illinois Central R. R. Co. *vs.* Coley, 28 Ky.

L. R., 336; Dudley *vs.* Illinois Central R. R. Co., 29 Ky. L. R., 1029 and P. A. Underwood's Admr. *vs.* Illinois Central R. R. Co., delivered June 14, 1907, this court recognized the rule to be that, although, the petition for removal of the case failed to allege
364 any jurisdictional facts, which would authorize the removal of the case, yet if on the trial it is developed that the plaintiff in the action had not reasons for believing that the resident defendants in the action were responsible to him in damages, and it is made evident that their joinder as defendants with the non-resident, was made for the purpose of depriving the Federal court of jurisdiction to try the case, then this court will reverse and remand with directions to the lower court to remove the case to the Federal court. But the case at bar does not come within this principle. The appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it.

At the close of the evidence, and when the court gave peremptory instructions in behalf of the resident corporation and F. J. Durbin, appellant, Illinois Central R. R. Co. again filed its petition and bond and asked for a removal of the case to the Federal court, which motion the court overruled, and in our opinion properly. Instead of the evidence showing an improper joinder of defendants it made it plain that the joinder was proper.

For these reasons the judgment of the lower court is affirmed. Whole court sitting.

H. D. ALLEN,
TRABUE, DOOLEN & COX,
J. M. DICKINSON,
LOCKETT & LOCKETT,
For Appellant.

HENDRICK — MILLER,
P. B. MILLER,
For Appellee.

365 And be it remembered that afterwards on the 17th day of July 1907 that the time of the appellant to file a petition for rehearing was extended by Judge Hobson, until the first day of the September term.

Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
JOHN E. SHEEGOG'S ADM'R, Appellee.

On motion of appellant time is given to it to and including the first day of the September term of Court, 1907 to file a petition for a rehearing herein.

July 17, 1907.

J. P. HOBSON,
Judge Court of Appeals.

And afterwards on the 16th day of September at a Court of Appeals held at the Capitol at Frankfort, the following order was entered towit:

I. C. R. R. Co.
vs.
Sheegog's Adm'r.

Union.

Came the appellant by counsel and filed a petition, and moved the Court to grant a rehearing, which motion is submitted. (The petition for rehearing mentioned in the foregoing order is as follows:)

366 Court of Appeals of Kentucky.

Appearance Docket, September Term, 1905.

No. 54.

Illinois Central Railroad Company, Appellant,
v.
R. W. Sheegog, Administrator of J. E. Sheegog, Appellee.

Petition for Rehearing.

This petition shall not be a rehash of our arguments heretofore made, notwithstanding the confidence with which they were offered, but contain only grounds especially pertinent to the right to a rehearing.

Our application for an oral argument was overruled upon the ground, as we understood, that the questions involved had just been orally argued in several cases, nevertheless those questions have been decided in our favor in Dudley *v.* this Company (29 K. L. R., 1029, — S. W. —) and Underwood's Admr. *v.* Company (— Ky., —, S. W.), and this case has been determined upon a constitutional question of great difficulty and importance, not only without oral argument, but when its argument was pretermitted by us upon the assumption that the question had been settled in our favor in Swice's Admr. *v.* Maysville & B. S. R. R. Co., 116 Ky., 253. The
367 present case establishes a construction of Sec. 203 of the Constitution without oral argument, and, as we contend, virtually overruling Swice's Admr. *v.* Maysville & B. S. R. R. Co.

Next, we complain that this Court says (Opin., p. 9):

"There is no question but that the petition of appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants; this is conceded." (Italics ours.)

Again (Opin., p. 12), this Court says:

"As stated, it is conceded that a joint cause of action was alleged in the petition of appellant against all three of the defendants." (Italics ours.)

These declarations have certainly resulted from inadvertence, because appellant made no such concessions; there was, as aforesaid, no oral argument, such argument being denied us, and the briefs show that the Court is in error in saying that such concession was made. *E contra*, in our original brief (p. 25) we said:

"The petition states no cause of action against either the C., St. L. & N. O. R. R. Co., the lessor, or Durbin, and, accordingly, the pre sumption is conclusive that they were joined as appellant's co-defendants to defeat Federal jurisdiction." Citing authorities.

368 "By the Swice, Yates and Axline cases, it is esbtlished that the C., S. L. & N. O. R. R. Co. is not responsible to appellee, and that he never had any cause of action against that Company. His joinder of that Company, therefore, was in fraud of Federal jurisdiction. Nor is any cause of action stated against Durbin, the conductor."

In our reply brief we said (p. 14):

"The allegations concerning Durbin were frivolous, and, as appears from the above quotation from appellee's brief, appellee purposely introduced no evidence concerning Durbin. Indeed, the situation as manifested by the record is that there was no conceivable case against Durbin. He was simply in the caboose when the accident happened, having done nothing nor omitted anything material to it. Appellee's petition may be read in vain to discover what Durbin did or omitted material to the controversy. As aforesaid, Slaughter *v.* N. C. & St. L. Ry. Co., is in point and conclusive."

"Cause of Action *v.* C., St. L. & N. O. R. R. Co."

"Our opponent's arguments to establish a cause of action against the C., S. L. & N. O. R. R. Co. are far fetched indeed. Appellee himself alleged that the C., S. L. & N. O. R. R. Co. was owner of the track, etc., 'leased' it to the I. C. R. R. Co. 'by written lease duly executed, signed, acknowledged, delivered and accepted by the

369 Illinois Central Railroad Company, which written lease was duly recorded in the proper offices in the State of Kentucky, and immediately went into effect between the corporate defendants, and thereafter the Illinois Central Railroad Company undertook to, and has, operated said railroad in and through said county.'

"This allegation is taken most strongly against the pleader (Davis *v.* C. & O. Ry. Co., 116 Ky., 144; Slaughter *v.* N. C. & St. L. Ry. Co., *supra*)," etc., etc.

"Accordingly, the case presented is exactly within Swice's Admr. *v.* M. & B. S. R. R. Co., 116 Ky., 223, and the other cases cited at page 25 of our original brief."

After reviewing Swice case and McCabe case, we said:

"We can not regard it as necessary, therefore, to further discuss this question."

In the face of these direct proofs to the contrary, how can it be said that a joint cause of action against appellant and its two co-defendants was by us conceded? We believe that this Court will, upon its attention being called to the real facts, cheerfully eliminate the foregoing recitals from its opinion.

We next complain that this Court says (p. 13), in referring to our petition for removal:

"Even if this plea could be made available, the petition was defective; it was an attempt to plead a private statute. Section 119 of our Civil Code of Practice provides: 'In pleading a private
370 statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law.' The title of the act is not stated in the petition, nor is there any attempt to state it. The contents of the act stated, the petitioner only alleging its conclusions as to the contents, which were that the Chicago, St. Louis & New Orleans Railroad Company had the power to construct and lease to the petitioner the railroad. The same remarks will apply to the alleged contract of lease, the contents of which is not stated in the petition, nor a copy filed. The conclusion was that the lease gave it dominion over the road and under same it operated the road. It is admitted that the Chicago, St. Louis & New Orleans Railroad Company was and is the owner of the road, that it still maintains its corporate organization and existence, but instead of operating the road itself directly, has bargained with the Illinois Central Railroad Company to run it for a compensation, as we must suppose, as the terms of the lease are not stated in the petition for removal. Even if the act and the lease had not been defectively pleaded, the result would be the same."

To this criticism of our petition for removal, we must reply that the Code of Practice does not regulate, but that the Act of Congress regulates petitions for removal. This recital of the Court must also have been inadvertent, but we submit should be eliminated.

Our allegations as to the contents of the lease were not con-
371 troverted by appellee, but, *e contra*, they were virtually a paraphrase of what appellee had already himself alleged in his petition, and such allegations are taken most strongly against him (Davis *v.* C. & O. Ry. Co., 116 Ky., 144; Slaughter *v.* N. C. & St. L. Ry. Co., 28 Ky. L. R., —).

Appellee himself had alleged that the lessor leased the railroad

"by written lease duly executed, signed, acknowledged and accepted by the Illinois Central Railroad Company, which written lease was duly recorded in the proper offices in the State of Kentucky, and immediately went into effect between the corporate defendants, and thereafter the Illinois Central Railroad Company undertook to and has operated said railroad in and through said county."

Appellee was, therefore, most careful to show a real lease, properly executed and "duly recorded," "in the proper offices, and that" "thereafter" the lessee operated the road.

As the Court, however, does not rest its judgment upon concessions, and we have shown that the Court was in error in reciting their existence, we pray that the recitals be eliminated from the opinion.

Next, we complain that the Court recites that the testimony showed an improper track, when it was uncontroverted that the track had always proved sufficient for fast running, and that no accident had resulted from any condition of the track, the accident in question having resulted from collision with a mule. There was
372 ample evidence that the track was in good condition, but the evidence recited by the Court that the ties had been laid on

dirt and much of it washed away, and that when a train passed over the track "it would sink in some places and rise in others," was utterly impertinent to the question in point, to-wit, liability *vel. non*, for an injury resulting from collision with a mule. Assuming (which we controvert) that the track was, as some witnesses contended and the Court recites, what had it to do with the derailment resulting from the collision with the mule? If an engine strike a mule and is derailed, the engineer is killed whether the track be good or bad. Whether or not the track "would sink in some places and rise in others," is immaterial to the question at issue. The sufficiency of railroad tracks is not gauged with reference to collisions with animals, but by their fitness for operation of trains with speed, and it is uncontroverted that this track was sufficient for operation of fast trains, and that such trains were operated with such speed continually. What relevancy, therefore, can the recital in the opinion that "it was gross negligence on appellant's part to direct or suffer its trains to be run, from 20 to 30 miles an hour at this point, knowing also that they had failed to put cattle guards at the public crossing, and that stock might be expected in this *cul-de-sac* at any time?"

If the chance of stray stock begot a duty, would it not exist whether the track were good or bad? When the Court intimates that a speed of twenty or thirty miles per hour was negligent in view of a chance of stray cattle, the condition of the track was proved to be immaterial. The improper speed, however, would not involve the Kentucky corporation, and would not prevent removal
373 to the Federal Court. Appellee's pretense, therefore, of a defective track as a proximate cause of injury was indispensable to his scheme to prevent removal, for the speed was appellant, petitioner's, act, and was not the act of the Kentucky corporation. It, accordingly, appears that it was error to adopt appellee's contention of a defective track as a proximate cause of injury. That the assumed condition of the track was immaterial becomes too obvious for discussion when we see appellee's preposterous theory of the road's condition as an agent in causing the collision, a theory so fanciful that the Court has not noticed it. Nevertheless, it is discovered by the Court's recitals. The theory was that because the road was not ballasted there was a greater distance from the bottom of the pilot to the earth between ties than would have existed had ballast been placed between ties, and that, therefore, the mule which was run over would have been thrown from the track if it had been ballasted and a standard pilot had been used instead of a stub pilot. Consequently, the irrational claim was advanced that the derailment of the engine resulted from the use of a stub pilot and a failure to ballast the track. This, the real contention of appellee, is not considered by the Court. Nevertheless, there is no basis for a recovery except the claim based upon the absence of stone, gravel, or cinder ballast filling the space between ties, and the use of a stub instead of a standard pilot.

Appellee's theory of the accident is so fanciful as almost to elude mental apprehension. It is advanced in the examination of Ex-conductor Fivecoats. He is permitted to discuss at great length

his opinion of how railroad ought to be built (pp. 23, 24). He is asked (p. 25):

374 "When a track is properly ballasted as you have described, how far would it be from the top of the fill to the bottom of the pilot?

"A. About two inches if your ballast is properly placed between the ties.

"Q. Can a mule derail an engine without going under the engine?

"A. No sir.

"Q. Explain to the jury if the track is properly ballasted and the cowcatcher properly constructed, what would it do when the engine struck a cow or mule—would it knock it off, or knock it down in front of the engine?

"A. It would knock it off the track to one side.

"Q. Why?

"A. Well, the pilot is sloped out this way, and when it struck an animal it would go under it and throw it off; it is about four inches of the side of the — and two inches, between the rail and the pilot, and it is so close that when it strikes anything it will go under and throw it off." (p. 25.)

Cross-questioned, he says (p. 33), that ballasted in the condition that the track was—

"It would be just as liable to run over it as it would be to knock it off.

"Q. Would it not throw it off on any track?

"A. No, sir.

375 "Q. Now, suppose Mr. Fivecoats, that if an animal is lying on the track with its feet towards the pilot; what is to prevent that pilot from running up the legs and running over it?

"A. Well, because if the track was ballasted and in proper condition, there would be no room for the legs to go up under the trucks.

"Q. With the feet of that mule turned towards the engine, if it is there in its natural state, would not the feet go under the pilot?

"A. No, it would not; if the track was ballasted there would be no danger of it going under there."

It thus appears that the theory upon which the recovery was had was not that the track was unsafe for the operation of trains, but unsafe in the event that the engine encountered the mule lying upon the track with its feet advanced toward the engine, in which event even the tiny feet of the mule would not go under the pilot if the ballast were piled between the ties sufficiently high to leave insufficient room between the top of the ballast and the rails.

This question was much discussed in our briefs, but further citation of authority seems unnecessary unless to notice Neeling *v.* C., St. P. & K. R. R. Co., 98 Iowa, 554, and Coxe *v.* C. & N. W. Ry. Co., 102 Iowa, 711.

The latter case is directly in point. The train upon which the deceased fireman was riding was derailed through a collision with a limb which had fallen in a storm, and, unknown to the engineer, been caught by the engine and carried until it came into contact

with the blocking and rails at a switch, when the front wheels
376 of the engine were there caused to leave the track. To the complaint of excessive speed and violation of rule 128 for its regulation, the Court responded:

"Whatever may be the reason for the rule, we are clearly of the opinion that the speed of the train was not the cause of this accident, and that, with the limb carried along as it was, the accident would have occurred if the speed had been at the rate of three or five miles per hour less than it was. Had the speed been but ten miles per hour, the derailment and overturning of the engine would as surely have followed as it did at thirteen to fifteen miles per hour. We think, under the evidence as to the purpose of Rule 128, and the construction given to it by employés, the engineer was not negligent in running at from thirteen to fifteen miles per hour over that switch; but, conceding that he was, we are clearly of the opinion that the limb, not the speed, was the direct and proximate cause of the accident."

Will this Court affirm a judgment against appellant based upon such a pretext as is invoked when its further attention is thus sharply called to the situation?

In L. & N. *v.* Milliken, 51 S. W. Rep., 796; 21 Ky. L. R., 489, 492, this Court said concerning a brakeman who fell or was knocked from the top of a freight train:

"The court also erred in allowing proof to the jury of the unusual speed of the train at the time of the accident. Appellant had
377 a right to run its train at any rate of speed it chose, and if, from the oscillation of the train, the intestate's feet were swung out in contact with the mail bag by reason of the unusual speed of the train, this was one of the risks incidental to the business in which the intestate was engaged, which he assumed in entering the service."

If there were a defective roadbed—*i. e.*, a roadbed not properly constructed for collisions with animals—it is still not contended that the derailment would have resulted except for the use of the stub pilot, because it is not shown that there was insufficient distance between the bottom of a standard pilot and the earth between ties for the miraculous concatenation of circumstances invoked by appellee as the proximate cause of the catastrophe, and it is clear that the use of a stub pilot instead of the standard pilot is no basis of liability in such a case. The engineer knew what pilot was used, there was nothing hidden or concealed, and there is no showing of the impropriety of a stub pilot. The contention is simply that the stub pilot was improper at this point because there was no ballast between the ties, so that there was too great a distance from the earth between the ties and the bottom of the stub pilot, a suggestion too remote and far-fetched for serious discussion.

We have, therefore, no liability based upon the use of the stub pilot. Brooks *v.* R. R. Co., 47 Fed., 687, where the Court granted defendant a peremptory instruction upon the complaint of an improperly constructed engine, is in accord with all the decisions of

this Court, and because it is a case of an engine complained of,
378 the Court's language is in point, to-wit:

"The plaintiff, in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incidental to that situation, including such as were liable to occur in consequence of any visible defect in the machinery and appliances supplied for use in connection with his work," etc.

Although the use of a stub pilot, *i. e.*, a pilot running higher from the rail, and slanting less than a standard pilot, is no basis for liability, the Company, not being compellable to adopt any particular design of pilot, and the engineer being perfectly familiar with his pilot, everything about it being open and obvious, nevertheless, this Court has given prominence to appellant's legal and innocent act of using such pilot, as an element of a cause of action against appellant. We submit that upon reconsideration this Court would be unwilling to adhere to such a ruling, or apparent ruling.

Seeing that the train's speed was no element of a cause of action, the track being safe for fast running, and a collision with a mule and not the speed being the proximate cause of derailment, and that the use of the stub instead of the standard pilot is no element of a cause of action, the ground upon which this Court has based its affirmance of the judgment below disappears. This would be so even if there were any duty to fence, but we have shown that there
379 was not only no duty but no right to fence at the station, Brief 9; Section 1792, 1793, Ky. Statutes.

Federal Question.

The principal point considered in this Court's opinion, however, is the Federal Question. Indeed, this seems to have overshadowed the merits of the case, and probably its prominence was the cause of so distracting the Court's attention from the merits as to allow the affirmance of such a judgment without full appreciation.

The Federal right of removal to the Federal Court is denied in the opinion upon the ground that the death of decedent "was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe road bed." (Opin., p. 23.) In all earnestness we ask if this is true? Was "intestate's death" "the proximate result of the failure" "to construct a safe road bed?" This means, first, that the Kentucky Company, the lessor, did not construct a safe road bed, and, secondly, that the condition of the road bed was the "proximate" cause of the derailment. In other words, this Court has said that if the road-bed had been ballasted with stone, gravel or cinders flush with the top of the ties the derailment would not have resulted from the collision with the mule. Was this enunciation not inadvertent, and is there a judge upon the bench who is willing to vouch for it? Nevertheless, upon this proposition appellant is denied a right claimed under the Federal Constitution and legislation, and demanded in the way prescribed by Act of Congress.

We earnestly ask this Court to reconsider its ruling, in con-
380 fidence that it will not adhere thereto. We trust that by this analysis we manifest that the pretense of defective condition

of the road bed as the proximate cause of injury was invoked by appellee solely in fraud of Federal jurisdiction, and to prevent a removal to the Federal Court. If this scheme can be worked successfully, a claim of failure to perform some duty owed by the lessor can by ingenuity be worked into every case, and the right guaranteed by the Federal Constitution be invariably destroyed. This is obvious from a consideration of this case where a derailment resulted from a collision with a mule, and the Federal right of Federal jurisdiction is denied by this Court upon the ground that the proximate cause of the derailment and the death was the absence of the proper amount of ballast between cross ties.

It is immaterial, therefore, whether the lessor be, under Sec. 203, Ky. Const., or a proper construction of the common law liable for an injury resulting from a defective road-bed because, as we have just demonstrated, this injury did not result from such condition of the road-bed, but from the engine's collision with the mule, and the invocation by appellee of the condition of the road-bed as the proximate cause was a pretext to avoid Federal jurisdiction. Let us, however, consider Sec. 203 of the Constitution.

Lessor's Liability for Lessee's Acts.

The Constitution, Sec. 203, provides:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges."

381 Ky. Statutes, Sec. 769, provides:

"Any company may build such spurs," etc., as may be necessary to conduct its business," etc.;

"And may purchase the property and franchises of any other railroad company, at public or private sale, not a competing or parallel line; and may sell its franchises and property to any other company not a competing or parallel line or otherwise prohibited by law to purchase," etc., etc.

Is the opinion under review to be understood to declare a liability in perpetuity upon every railroad company which may exercise the right under Sec. 769 to sell its road and franchises, for the debts and other obligations incurred by the purchaser "in the operation, use or enjoyment of" the franchise sold?

Is the vendor, or lessor, now liable for all the obligations of the vendee, or lessee, forever, and is the vendee, or lessee, liable for all the obligations of the vendor, or lessor, forever? If so, then the sale and lease of railroads in Kentucky will probably be few hereafter. Certainly there is no intimation in the Constitution of any such liability upon vendor or lessor, or upon vendee or lessee. The Constitution does not declare a vendor or lessor liable for the obligations of the vendee or lessee, nor *vice versa*, but it forbids a sale or a lease of a franchise "so as to relieve the franchise or property held thereunder" from such liabilities. It is the "property" and "franchise" which are declared to be inalienable so as to escape liability

for obligations arising "in the use or enjoyment" thereof, and
382 not the lessor or lessee. There is no intimation whatever of any liability upon the lessor or vendor for the obligations of lessee or vendee, or vice versa, nor any intimation of any personal liability whatever. The liability, whatever it may be, imposed by the Constitution is a liability upon "the franchise or property held thereunder."

Assume that the Chicago, St. L. & N. O. R. R. Co., lessor (fraudulently joined as we claim to defeat Federal jurisdiction), owns a railroad from Louisville, Ky., to New Orleans, was Sec. 203, Constitution, intended to create a personal liability upon that Company in perpetuity for the acts of the I. C. R. R. Co. as lessee, to discharge which all its property in Kentucky, Tennessee, Mississippi and Louisiana might be subjected?—and would the same result have accrued had the Kentucky railroad and franchise been sold ("alienated") instead of having been leased? We submit that there is no intimation whatever in the Constitution of any personal liability upon vendor for obligations of vendee, or upon lessor for obligations of lessee, or *vice versa*.

If a personal libility existed for any obligation arising out of the condition of the road bed, as held in this case, why would not a similar liability exist for every obligation "contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges?" Why would not the lessor, or the vendor be personally liable forever for the wages of all employés, the salaries of all officers, the price of all supplies, for which the vendee or lessee might have incurred obligation "in the operation, use or enjoyment of such franchise," etc.? The language of the Constitution includes the one as much as the other (*i. e.*, under our contention, includes neither).

383 Consequently, if the lessor in this case be personally liable for the obligation, if any, to appellee then it would be liable for lessee's pay rolls, for its debts for supplies, in short, for practically all its obligations incurred in operation; and if such construction be placed upon the Constitution, would not the alienation and lease of railroads in Kentucky soon cease? What incentive would hereafter exist for the alienation or lease of a railroad? Such alienation and lease might bring the greatest benefit that could accrue to the State, and yet the construction of Sec. 203, Constitution, which would result from the decision in this case, would deter any owner of a railroad from leasing or selling it. One of the most important material things which ever happened in Kentucky was the sale of this railroad to the Chicago, St. L. & N. O. R. R. Co., and its lease to the Illinois Central Railroad Co. The great Illinois Central system, by these two transactions, was brought to Louisville and to Western Kentucky, and yet the sale and lease of railroads can hardly be expected to continue to occur if the lessor is forever afterward to remain bound for the obligations of the lessee.

Accordingly, we submit that it is clear that no personal liability was by the Constitution imposed upon the vendor or lessor for any acts of the vendee or lessee, but that the Constitution merely declares

that the "franchise," "or property held thereunder," shall not be relieved from the liability for certain acts of the grantee or lessee.

If this be a sound proposition, this Court will not adhere to the declarations in the opinion that the Illinois Central and the Chicago, St. Louis & New Orleans R. R. Co. are jointly liable to ap-
384 pellee or that "the appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it."

As aforesaid, an oral argument of this case was denied, and the questions supposed most prominently involved adjudged in our favor in cases decided since this case was submitted, but the question now decided was by us supposed to be concluded for us by Swice's Admr. *v.* M. & B. S. R. R. Co., 116 Ky., 253, and we were content to cite that case, and note its support by Yates *v.* I. C. R. R. Co., 137 Fed. R., 943, and Axline *v.* Toledo, etc., Co., 138 Fed., 169, see brief, p. 25.

In the McCabe case so much invoked in the opinion, 112 Ky., 861, the action was not brought by an employé, nor was the injury involved sustained by an employé, but the action was by the Administratrix of one killed by an engine while walking in a street. The claim against the lessor, railroad company, was, therefore, based upon a duty to the public. Accordingly, this Court, in the Swice case (116 Ky., 255), said concerning the McCabe case:

"It was there held that the lessor company continued liable to the public for the discharge of the obligation imposed on it by law; but whether it would be liable to the servants of the lessee for injuries received by reason of its negligence was a question not decided. The cases holding that the lessor is not liable for injuries to the servants of the lessee from its negligence are referred to in the opinion, and distinguished from the case before the Court. The case now
385 presented, requires a determination of this question, as Swice was in the employment of the lessee, and was injured, as alleged, by reason of its negligence."

After review of Lee *v.* S. P. R. R. Co., 116 Cal., 97, and other cases, this Court said (p. 256):

"The duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the road bed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's roadbed, and was inflicted upon one of its own employés by

reason of a defect in machinery entirely under its control, it
386 is difficult to see upon what principle of policy or justice the lessor would be held liable merely because it owned the road."

In the opinion under review it is said that the courts have exempted the lessor from the lessee's torts resulting from negligent operation of trains and general management of leased property, but held the lessor for injuries "from negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc. In the case of Swice's Admx. *v.* Maysville & B. S. R. R. Co., 116 Ky., 253, this distinction was recognized as the true rule."

We submit that this is not an accurate representation of the decision in the Swice case because what this Court said was:

"It may be that if the injury had occurred by reason of a defect in the roadbed," etc.,

the lessor would be liable. This Court did not say that even in such case liability would exist, but that it might result. The Court did not assume to decide that question, and we submit that it logically follows from the principles announced in the Swice case that no such liability would result because the rights of the lessee's servants are there recognized as arising out of their contract with their employer, and not out of any duty due the public, and their contract is with their employer and not with the lessor. As aforesaid, if the duty of operation be a duty which can not be delegated, then the lessor must
be liable as well for the wages of the lessee's employés as for
387 damages for their injuries resulting from defective road-bed, a proposition not treated in the opinion as at all admissible, and destruction of the right to lease or alienate.

Practically, however, the decision in the Swice case is in our favor on the question of lessor's liability for proper maintenance of plant, because the accident in that case resulted from the improper construction of "a narrow, elevated platform adjoining the coal dock" "by reason, as alleged, of its not being sufficiently secured." Such platform was a part of the leased property, as much as is a roadbed, and the duty of properly constructing it the same as regarding a roadbed; nevertheless, the lessor was held not liable.

We contend, however, that no personal liability whatever is cast upon the lessor, or vendor, but that the Constitution, Sec. 203, casts liability on the franchise and property only, which the lessor embarks in the venture.

The other cases relied on in the opinion are distinguishable from the case at bar because injury resulted from the defective construction, or improper construction, of tracks and structures by the lessor itself, while in this case it does not appear that the lessor was responsible for the absence of the ballast at the point where the collision with the mule occurred. *Non constat* that the lessor neglected any duty, because the lessee had been in possession many years and its track may have been ballasted when let, but afterward raised and no ballast provided; or ballast provided which washed away.

Thus in Lee *v.* Sou. Pac. Ry. Co. (Opin., p. 14), the accident was blamed to the owners "imperfectly constructing the rails and track

of the road at Hornby, and in allowing this defectively constructed track to remain out of repair, inadequate, and unsafe."

388 Likewise, in Nugent *v* Boston, etc., Co., 80 Me., 62, a brakeman was injured "by reason of the negligent construction of an awning at a station house built by defendant company," and the Court said:

"An authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc., the charter company can not, in the absence of statutory exemption discharge itself of legal responsibility," citing Arrowsmith *v.* N. & D. R. R. Co., 57 Fed. R., 165, etc.

In the instant case it is not even alleged that the lessor improperly constructed the roadbed. Appellee's allegation is (Opin., 2) that the lessor was owner of the roadbed, etc., that the lessee was owner of the engines and cars, etc., and Durbin was conductor, and "that by the negligence of both of said companies, defendants hereto, the said roadbeds, rails, track, cattle guards, tiles, fence and right-of-way of the railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous and defective and improper condition, and by the negligence of the Illinois Central Railroad Company, its engines and cars were knowingly allowed to be and remain in an improper, defective and dangerous condition." (Italics ours.)

389 It is, consequently, not even contended that the roadbed was in the condition complained of when let to appellant. Appellant, therefore, was not circumstanced as was the lessor in Lee *v.* Sou. Pac. Co. or Nugent *v.* Boston, etc., Co., *supra*.

In Axline *v.* Toledo, etc., Co., 138 Fed. R., 169, the lessor railroad company was joined because of the provision of the Ohio Statute providing that "notwithstanding such lease, the corporation of this State, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith." (Italics ours.)

Nevertheless, it was held that such Statute referred to public rights, and did not hold the lessor in an action for injuries received in the service of the lessee.

The Statute construed in that case, however, is radically different from Section 203, Ky. Constitution, because the Ohio Statute provides for a joint liability, thus evidencing that Legislatures can, if they choose, frame statutes creating joint liability, but statutes radically different from our Constitution.

A matter necessitating a reformation of the opinion is that it quotes from the opinion in the McCabe case certain language which was stricken from that opinion on a petition for re-hearing, and not contained in that opinion as certified to the United States Supreme Court, on writ of error now there pending, as we are advised. The

language thus stricken appears, however, in the official report, but not in 23 Ky. L. R., 2328.

390 Another point which we should discuss if granted a rehearing, is the question of joint liability, assuming any liability of the lessor at all, that of the lessee being based upon the common law and arising out of the contract of employment, and that of the lessor, if any, arising out of the constitutional provision.

We should contend that the lessor is not jointly liable with the lessee, if liable at all, under a constitutional provision forbidding its franchise and property to be relieved from liability in the contingencies prescribed in the Constitution.

Federal Court's Decision.

This case was fully tried in the Federal Court after the motion to remand was overruled, and that Court granting a peremptory instruction for the defendant held that nothing but the collision with the mule was the proximate cause of the injury. That judgment is in full force and was never appealed from.

For the foregoing reasons among others we respectfully pray a rehearing because,

1. The Court under misapprehension or inadvertence declares that we conceded that a joint cause of action was alleged against appellant and the defendants improperly joined, when our contention was the contrary.

2. Because this Court condemns our petition for removal for not complying with Sec. 119, Ky. Code of Practice, when such petitions are governed by Act of Congress and not by Kentucky Statutes.

3. Because this case has been decided upon a construction

391 of a most difficult and important provision of the Kentucky Constitution of very far reaching effect and extensive application without an oral argument, and even without written discussion of its applicability.

4. Because Section 203, Ky. Constitution, has been construed to create a personal liability upon the lessor and a vendor of a railroad for the torts of a lessee forever or vendee afterward, arising out of the contract of employment as master and servant, between the lessee and its servants where the servant assumes or pretends to place the blame upon the road-bed.

5. Because the road-bed, whether defective or not, was not the proximate cause of the injury, the derailment having resulted from a collision with a mule, and would have resulted regardless of the condition of the road-bed.

6. Because there was not even an attempt to justify the joinder of Conductor Durbin, and one act of fraudulent joinder suggests fraud in the other joinder found in the case.

7. Because Sec. 203, Constitution, creates no personal liabiilty, but only forbids the relief of the franchise and property of the lessor from certain liabilities.

8. Because it is not contended that the condition of the track would have derailed the train had not a stub, instead of a standard

pilot been used, the stub pilot standing several inches higher from the rail and from the earth between cross ties than the standard pilot, and the lessor was not responsible for the use of the stub pilot, and even appellant was not so liable as appears above.

9. Because if the lessor were personally liable at all, such liability would result from a Statute, and would not be joint with that
392 of the lessee, the master, liable to the servant under his contract of employment and consequent common law liability.

10. Because the decision in the Swice case is not properly applied here, and the opinion quotes from the McCabe case language which, upon petition for a rehearing was expunged.

11. Because the other cases cited in the opinion were cases of the improper construction by the lessor itself of the structures which were really the proximate cause of the injury.

12. Last, but not least, the whole ground of holding liable the lessor, to-wit, the claim of defective road-bed, is unfounded, the proximate cause of the derailment being the collision with the mule, for which the road-bed was not responsible; and if a defective road-bed could have been the cause because of the distance from the top of the earth to the bottom of the stub pilot, such a result would have been so remote, and far-fetched, that it would not have been a natural or probable result, and neither the lessor nor lessee would have been liable for it.

Respectfully submitted,

TRABUE, DOOLAN & COX,
For Appellant.

J. M. DICKINSON,
H. D. ALLEN,
Of Counsel.

393 And on said date at a Court of Appeals held at the Capitol at Frankfort, the following order was entered towit:

I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

Came the appellee by counsel and tendered and moved to file a copy of Schedule, and copy of supersedeas bond as part of the transcript herein, to which motion appellant by counsel objected, which motion is submitted.

The additional record tendered by appellee is as follows:

Kentucky Court of Appeals.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
R. W. SHEEGOG, Adm'r, &c., Appellee.

Comes the appellee, R. W. Sheegog, Adm'r of J. A. Sheegog, and moves the Court to allow him to file as part of the record herein the copy of the supersedeas and appeal bond, executed by appellant, with Edmund F. Trabue and H. D. Allen as sureties, on the 31st day of March, 1905, within a very few days after the rendition of judgment in this action, by which bond the said judgment was superseded, and to make said bond a part of the record, and also moves the court to award damages upon the appeal in this action, and in sup-
394 port of said motion he files affidavit of one of his attorneys herewith which affidavit is in words and figures as follows:

The affiant, John G. Miller, says he is one of the attorneys for appellee, who took part in the trial of this action in the Circuit Court, and has had the management of this appeal, and he says that he lives in the City of Paducah, while this case was pending in Union Circuit Court at Morganfield, Kentucky, and that affiant wrote and inquired concerning the execution of this bond, and also of the schedule as to the copying of the record, and he says he files herewith as part of this his affidavit, first, the notice served upon him and co-counsel of the filing of the schedule, said notice being dated May 27th, 1905, and he also files an attested copy of the schedule itself, and files with his affidavit a copy of said bond. He says that he was informed that said bond had been executed, and that when the schedule or a copy of same was sent to him, he supposed the Clerk had obeyed the directions of the schedule, and copied the whole record as the said schedule directed, with the exception of the stenographer's transcript, as shown by the schedule, and he says that, supposing same had been filed, and not living in Morganfield, and having the record before him but a short time, he overlooked the fact that the said bond was not copied into the record, and in-as-much as the mandate has not yet been issued, and the judgment is still under the control of this court, he moves the court to allow this part of the record which was left out by mistake of the Clerk to be
395 filed as part of the record, and asks for damages upon an affirmance of the judgment, and that the court direct the mandate so to order when same shall be issued.

JOHN G. MILLER.

Subscribed and sworn to before me by John G. Miller, this the 14th day of September, 1907.

LULA MUNSON,
Examiner for McCracken County.

ILLINOIS CENTRAL RAILROAD CO., Appellant,
against
R. W. SHEEGOG, Administrator of J. E. Sheegog, Appellee.

Upon an Appeal from a Judgment of the Union Circuit Court,
Rendered 23rd Day of March, 1905.

Whereas, Said Appellant Illinois Central Railroad Company has taken an appeal from the judgment of the Union Circuit Court, rendered at its March term, 1905, against it in favor of the Appellee, for the sum of Eight Thousand Two Hundred and Fifty Dollars with interest from 23rd day of March 1905, and $50.70 Appellee's cost in Circuit Court and the Appellant desires to supersede the said judgment above mentioned;

Now, We, Illinois Central Railroad Company principal and Edmund F. Trabue and H. D. Allen, sureties, do hereby covenant to and with the Appellee R. W. She-gog Administrator of J. E. Sheegog that the Appellant will pay to the Appellee all costs and damages that may be adjudged against the Appellant on the Appeal, and also will satisfy and perform the said judgment above stated
396 in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the said Judgment aforesaid. (And also pay all rents, hire or damage, which during the pendency of the Appeal, may accrue on any part of the property of which the Appellee is kept out of possession by reason of the appeal.)

Witness our hands, this 31st day of March, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Att'y.*
EDMUND F. TRABUE,
By H. D. ALLEN, *Att'y in Fact.*
H. D. ALLEN.

Attest:

J. E. LILLY,
Clerk Union Circuit Court.

I, J. E. Lilly Clerk of the Union Circuit Court, do certify that the foregoing is a true copy of the Supersedeas Bond executed before me in the above styled cause 31st day March 1905 as appears of record in Supersedeas Bond Book in my office.

Given under my hand this 28th day August 1907.

J. E. LILLY,
Clerk of Union Circuit Court.

Union Circuit Court.

R. W. SHEEGOG, Administrator of J. E. Sheegog, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendant-.

Notice.

The plaintiff in the above styled cause is hereby notified that the defendant Illinois Central Railroad Company has this day filed in the office of the clerk of the Union Circuit Court a schedule
397 showing what parts of the record in this cause the said defendant wishes to have copied for the purpose of an appeal to the Court of Appeals.

This May 27th 1905.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Att'y.*

Executed on R. W. Sheegog Administrator of John E. Sheegog by delivering to him a copy of the above notice on the 1st day of June 1905.

W. D. BLACKWELL, *S. M. C.*,
By C. E. BLACKWELL, *D. S.*

I, J. E. Lilly Clerk of the Union Circuit Court certify that the foregoing is a correct copy of the Notice and Officer's return in above styled cause as filed in my office June 3rd 1905.

J. E. LILLY,
Clerk of Union Circuit Court.

Union Circuit Court.

R. W. SHEEGOG, Administrator, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, &c., Defendants.

Schedule.

For the purpose of the appeal to the Court of Appeals granted in this case, the Clerk of the Union Circuit Court is directed and requested to copy the entire record herein, except the evidence
398 taken down and transcribed by the Stenographer, Virginia Phipps, and which evidence as transcribed the said Clerk will send with and as a part of the record in this cause and without being copied. He will also transmit, without being copied, and as part of the record the original plat or diagram of the track &c at Harding Station used in the trial of this cause.

This May 27th, 1905.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. ALLEN, *Att'y.*

399 And afterwards on the 15th day of November 1907 at a Court of Appeals held at the Capitol at Frankfort, the following order was entered towit:

I. C. R. R. Co.
vs.
SHEEGOG'S ADM'R.

Union.

The Court being sufficiently advised, the opinion delivered herein is corrected on its face, and it is considered that appellant's petition for rehearing be and the same is overruled, and it is further considered that appellant's motion to file supersedeas bond and for damages on the affirmance, be and the same is overruled.

(The opinion as corrected on its face is as follows:

400 Kentucky Court of Appeals.

(To be Reported) June 20, 1907.

ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,
vs.
JOHN E. SHEEGOG'S ADM'R., Appellee.

Appeal from Union Circuit Court.

Opinion of the Court by Judge NUNN:

This action was instituted by the administrator of John E. Sheegog who was killed in the derailment of an engine and train of cars on which he was engineer at the time. The Chicago, St. Louis & New Orleans Railroad Company, the owner and lessor of the road, Illinois Central Railroad Company, the lessee, and F. J. Durbin, the conductor in charge of the train, were made defendants to the action. It was alleged in the petition, in substance, that on the seventh day of May, 1903, his intestate was in the employment of the defendant, Illinois Central Railroad Company, as an engineer on one of its trains, and while in the performance of his duty, as such engineer, the train upon which he was engaged was, through the joint and gross negligence and carelessness of the three defendants herein, derailed and his intestate thereby instantly killed.

In the petition the negligence and concurrent negligence of each of the defendants is allged with some particularity. We copy from it as follows:

401 "At the time the defendant, the Chicago, St. Louis & New Orleans Railroad Company was the owner of said road-bed, fences, right-of-way, trestles and bridges where said accident happened, and the Illinois Central Railroad Company was the lessee of said railroad property and premises, and was the owner of the engines and cars, trains and appliances by which the said intestate was killed, and was operating said road, trains and engine, and the defendant,

F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter Railroad Company, and in charge of said train and engine and appliances, and the said intestate was required to obey and was obeying and acting under the orders of the said defendant, F. J. Durbin.

The plaintiff now says, that by the negligence of both of said companies, defendants hereto, the said road-bed, rails, track, cattle-guards, ties, fence and right-of-way, of the said railroad was allowed to be and for a long time had been in a weak, rotten, ruinous and defective and improper condition, and by the negligence of the Illinois Central Railroad Company, its engine and cars were knowingly allowed to be and remain in an improper, defective and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road, premises and cars of the defendants were known to the said defendants, and at the time of this said wreck and
402 accident, same were being operated in a careless manner by all of said defendants; and the said Durbin, by his negligence in running, ordering and directing said train contributed to the cause of said accident; and the plaintiff says that the negligence of the defendant (C. St. L. & N. O. R. R. Co.) in its maintenance of its tracks, road bed, engine, cattle guard, rails, ties, fences, etc., as above set out, and together with the negligence of the said Illinois Central Railroad Company, in directing and permitting its engine, cars and road to be operated while in a defective and dangerous condition, and the negligence of the said conductor, in ordering and directing the running and management of said train, and in failing to give proper directions all together jointly caused said wreck and killed the plaintiff's said intestate," etc.

"That his intestate was a young, vigorous man, an excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects and making and saving large sums of money, and by the joint gross negligence of the defendants in thus causing his death, the plaintiff has been damaged in the sum of $25,000.00." The plaintiff further alleged that his place of residence, as well as that of his intestate, to the date of his death, was in Central City, Muhlenburg county, Kentucky; that the defendant, Illinois Central Railroad Company, was a corporation organized under the laws of the state of Illinois and the defendant, Chicago, St. Louis & New Orleans Railroad Company, was a Kentucky Corporation organized under the laws of this state, and the defendant, F. J. Durbin,
403 was a resident and a citizen of the state of Kentucky.

The defendant, Illinois Central Railroad Company, filed its petition and bond for removal of the case to the Federal court, alleging a separable controversy between it and appellee determinable between them without either of its co-defendants, and alleging joinder of its co-defendants in fraud of Federal jurisdiction. The court refused to transfer the case. Then each of the defendants filed a separate answer denying all material allegations of the petition.

The issues being completed a trial was had which resulted in a verdict for appellee as against the Illinois Central Railroad Company for $8,250.00; and on peremptory instructions the jury found for the

other two defendants. The Illinois Central Railroad Company appeals, and assigns the following reasons for reversal: First—The admission of incompetent and the rejection of competent evidence. Second—Erroneous instructions to the jury. Third—The refusal of the court to give a peremptory instruction to find for it. Fourth—The refusal of the court to surrender jurisdiction to the Federal court.

The third assignment for reversal necessitates our stating the substance of the evidence. Appellee's testimony conduces to show the following facts. The deceased was a young man, about twenty-nine years old, sober, industrious, of good habits, strong and in good health, that he had been following the avocation of railroad engineer for about eight years, that his run was from Central City, his home, to Paducah, Kentucky, that he was killed on appellant's line of road which connects with the main line at Princeton, Kentucky
404 and extends to Evansville, Ind. Known as the Ohio Valley line. The deceased had only made about two trips on this line, both at night; one about three weeks before and the one on which he was killed.

When the train reached a flag station called "Harding" in Union County, Kentucky, the engine struck a mule, turned over and the deceased was instantly killed. No one lived at this station. A public road passes by it, crossing the railroad at right angles. From this public road running south, the way the train was going, a distance of about one hundred and fifty or two hundred yards to a culvert, the road is fenced on either side; but there were no cattle guards at the public road and loose stock, according to the evidence, passed into this cul-de-sac and grazed on either side of the track. The proof shows that this mule came upon the track in front of the engine and made a few jumps south, and then was struck by the engine and cut in two, leaving the front part on the left of the track between the ends of two ties. From this point the evidences of the small wheels that support the pilot were noticed on the ties for fifteen or twenty feet, and from that point the large drive wheels of the engine were thrown from the rails and from that point to twenty or thirty feet beyond the culvert the ties, rails and every thing were swept clean.

The proof shows that the engine was fitted with a stub pilot instead of with a standard pilot, that the stub pilot stood four or more inches above the rails and had but the slightest slant, that the standard pilot was very slanting, extended out in front of the engine four or five feet and rested only two inches above the rails and that, with it in use, when the track is properly constructed and reasonably
405 well ballasted, it was almost impossible for stock when struck to get under the train; the pilot would knock them off. The testimony showed, without much contradiction, that the portion of the track described had never been ballasted, that the ties were laid on dirt, that much of it had been washed away so that it did not come to the top of the ties, that a track is properly ballasted when crushed stone, gravel or cinders are tamped under, upon and between the ties, and up to a point about even with the top of the rails, (and such was the condition of the track at each end of this cul-de-sac) and that this track as constructed left about fourteen or six-

teen inches from this stub pilot to the dirt between the ties, which made the chances of clearing the track of stock when struck by the pilot doubtful.

It was proven by some of the section hands on the road, that this part of the track had been in that condition for a long time, and the general superintendent of the road had had his attention called to it, and had been requested to furnish material to put that part of the road in reasonably safe condition; but had failed to do so up to the time of the accident. They also stated that the track as laid would often get out of alignment, and that they were compelled, by the use of jackscrews, to force it back. Many witnesses testified that they had been at this point when trains passed and saw that the track was insecure, that engines and cars would wabble in passing over it, would sink in some places and rise in others, would mash some times down and water and mud would gush up over them, that when trains had passed the rails would straighten and raise some of the ties two inches from the earth. Many witnesses
406 examined the conditions there after the wreck, and about all of them testifies that there were many rotten ties, some of them stated that more than one-half were rotten, that some of them had rotted into two pieces and so rotten that they could pull the spikes from them with their fingers.

The most serious complaint made by appellant to the instructions is that the court gave an instruction on punitive damages. Section 241 of the constitution, and section 6 of the statutes provides: That when ever the death of a person results from an injury inflicted by negligence, damages may be recovered for such death, and when the negligence is gross punitive damages may be recovered.

It is certain from the evidence that those in charge of the railroad knew of its defective condition; and it was gross negligence on appellant's part to direct or suffer its trains to be run, from twenty to thirty miles an hour at this point, knowing also that they had failed to put cattle guards at the public crossing and that stock might be expected in this cul-de-sac at any time. Appellant's conduct in this evidenced a reckless disregard of the rights and safety of those whose business required them to travel over this road. There were no errors in the instructions prejudicial to the substantial rights of appellant; nor did the court commit any prejudicial error in the admission or rejection of evidence.

The main contention of appellant is that the court erred in refusing to surrender jurisdiction to the Federal Court. There is no question but that the petition of appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants. Upon the filing of the petition by appellant for
407 removal of the case to the Federal court, it was the duty of the judge of the state court to determine from the petition and record, whether or not there was presented a Federal case, if so it was his duty to proceed no further, but to remove the case to the Federal court, and it was the duty of that court to hear the proof on the jurisdictional facts, or questions raised by the petition

for removal, and determine whether the Federal court or State court had jurisdiction of the case.

In the case of Crehore *v.* Ohio & Mississippi Railway Co., 131 U. S., 240, the court, Justice Harlan delivering the opinion, said:

"If the case be not removed, the jurisdiction of the state court remains unaffected, and, under the act of Congress, the jurisdiction of the Federal court could not attach until it becomes the duty of the state court to proceed no further. No such duty arises unless a case is made by the record that entitles the party to a removal."

In the same opinion the court further said:

"It thus appears that a case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;' and 'all issues of
408 fact made upon the petition for removal must be tried in the Circuit court.'" (Meaning the Federal court)

See the following cases which announce the same rule, Stone *vs.* South Carolina, 117 U. S. 430; Stevens *vs.* Nichols, 130 U. S. 230; Phoenix Ins. Co. *vs.* Pechner, 95 U. S. 183; Powers *vs.* Railroad Co., 169 U. S. 92, and the following decisions of this state recognizing the same rule, McCabe's Adm'r'x *vs.* Maysville & Big Sandy Railroad Co., 112 Ky. 861; Rutherford *vs.* Illinois Central Railroad Co., 27 Ky. L. R. 397 and Illinois Central Railroad Co. *vs.* Jones, Ky. L. R. 31, in this last case the court said:

"If both the state and Federal Courts could try the same facts as to jurisdiction, different conclusions might be reached, and unseemly conflict and confusions result. To avoid these, the Congress has wisely made the condition of the Federal Court's jurisdiction to depend upon the filing in the State Court in due time of a petition, in which, according to the unbroken current of the decisions of the Federal Courts construing the act, all necessary facts to show *prima facie* a right in the petitioner for the removal must be set out, not as conclusions of law; or, such necessary facts must affirmatively and explicitly appear elsewhere in the record when the application to the state Court for the removal is made.

(Crehore *vs.* Ohio R. R. Co., 131 U. S. 240; Freeman *vs.* Butler, 39 Fed. 1 (opinion by Barr District Judge) Seddon *vs.* Allen, 132 U. S. 27; Smith *vs.* Horton, 7 Fed. 270; Amory *vs.* Amory,
409 95 U. S. 186; Weed Sewing Machine Co. *vs.* Smith, 71 Ill., 204; Chester *vs.* Chester, 7 Fed. 1; Burlington &c Ry. Co. *vs.* Dunn, 122 U. S. 517; Railway Co. *vs.* Ramsey, 22 Wall, 322; Grace *vs.* Am. Central Ins. Co., 109 U. S., 278; Gold W. & W. Co. *vs.* Keyes, 96 U. S., 199; Corson *vs.* Dunham, 121 U. S., 421; Removal cases 100 U. S. 457; Yulee *vs.* Vose, 99 U. S. 539.)

The truthfulness of these facts may then, and not till then, be inquired into in the Federal Court. As the petition for the removal and the record in this case did not in our opinion state facts sufficient to confer jurisdiction upon the United States Circuit Court,

that tribunal had not the right to inquire into their truthfulness, nor to hear evidence to the other facts not alleged in the record or the petition for removal, and by adding such evidence to the insufficient allegations find the needed jurisdictional facts."

The question now for consideration is did the court err in refusing a removal of the case to the Federal court. As stated, a joint cause of action was alleged in the petition of appellant against all three of the defendants. The Common Law distinction between different forms of action have been abolished by our Code of Practice; and all persons who are liable for a wrong may now be sued jointly in this state in an action to recover for negligence. See McCabe's Adm'r'x *vs.* Maysville & Big Sandy Railroad Co., *supra.* The petition for removal denies the negligence charged in the petition. This is not a jurisdictional fact under all the authorities. In an attempt to show that the Chicago, St. Louis & New Orleans
410 Railroad Company was joined as defendant with it wrongfully, it was alleged in the petition for removal that the Chicago, St. Louis & New Orleans Railroad Company was empowered to construct and lease to the petitioner its railroad mentioned in plaintiff's petition; and stated that it was so empowered by an act of the General Assembly of the Commonwealth of Kentucky, long prior to the adoption of the present constitution of the Commonwealth of Kentucky; which act of the General Assembly became a law on the 24th day of February, 1882; and that pursuant to such powers the Chicago, St. Louis & New Orleans Railroad Company, being the owner, leased to the petitioner all of the railroad mentioned in the petition, and parted with all dominion over it; and that your petitioner has since the lease (1897) continuously operated the railroad exclusively, and the lessor never at any time operated it.

Even if this plea could be made available, the petition was defective; it was an attempt to plead a private statute. Section 119 of our Civil code of practice provides:

"In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

The title of the act is not stated in the petition, nor is there any attempt to state it. The contents of the acts is not stated, the petitioner only alleged its conclusions as to he contents, which were that the Chicago St. Louis & New Orleans Railroad Company had the power to construct and lease to the petitioner the railroad. The same remarks will apply to the alleged contract of lease, the contents of which is not stated in the petition, nor a copy filed. The
411 conclusion was that the lease gave it dominion over the road and under same it operated the road. It is admitted that the Chicago, St. Louis & New Orleans Railroad Company was and is the owner of the road, that it still maintains its corporate organization and existence, but instead of operating the road itself directly, has bargained with the Illinois Central Railroad Company to run it for a compensation, as we must suppose, as the terms of the lease are not stated in the petition for removal. Even if the act and the lease had not been defectively pleaded, the result would be the same. The Chicago, St. Louis & New Orleans Railroad Company was given a

franchise by the state and it therefore assumed certain burdens, and under the constitution and laws of this state, it can not by a lease exempt itself from responsibility for the torts of itself and lessee. In the case of Lee *vs.* Southern Pacific R. Co., 38 L. R. A., 71, the court said:

"Where a statute authorizing leases contains no clause exempting in any respect the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses, *ect.*"

Section 203 of the state Constitution is in these words:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its
412 privileges." This court in construing this section of the constitution, in the case of McCabe's Adm'r'x *vs.* Maysville & Big Sandy R. R. Co., *supra,* said:

"The franchises of a corporation are its property. The declaration that these in case of a lease or alienation shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability; for its existance is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can exempt it from liability for the wrongs of the lessee. If the lease in question was made after the adoption of the Constitution, it would not exempt the lessor from liability * * * but if it was made before the adoption of the Constitution the result is the same?

In the same case the court again said:

"The defendant company, therefore, in reality still enjoys the benefits of its charter, and can not be permitted to escape its corresponding obligations. * * * A grant to a corporation of a right to lay out, construct, and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the power of sovereignty for the purpose of making pecuniary profit to itself.

This is its franchise. Such grants are never made except at
413 the request of the corporation. In return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right, in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises except by an act of the legislature to that effect so distinct and unequivocal as not to be open to mistakes. 'Nothing should be left to inference.' * * * 'The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. It was under a positive duty and obligation to the public, and the consent of the Legislature to the making of the lease did not imply

a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it by the Legislature, clear evidence of a legislative assent to such exoneration should be found.' "

It will be seen from the petition of removal that there is no allegation that the act authorizing the lease, even attempted to relieve the lessor from its primary responsibility to the public; and the court in the McCabe case continuing said:

" 'After conferring upon a corporation the right of eminent
414 domain, with many other special privileges which the Legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the State can not be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs and defaults.' See, to the same effect, Balsley *vs.* Railroad Co., 119 Ill., 68, 8 N. E., 859; 59 Am. Rep., 784; Singleton *vs.* Southwestern R. R., 70 Ga., 464, 48 Am. Rep., 574; Tillett *vs.* Railroad Co., 118 N. C., 1031, 24 S. E., III; Railroad Co., *vs.* Morris, 68 Tex., 59, 3 S. W., 457; Chollette *vs.* Railroad Co., 26 Neb., 169, 41 N. W., 1106, 4 L. R. A., 135; Parr *vs.* Railroad Co., 43 S. C., 197, 20 S. E., 1009, 49 Am. St. Rep., 826; Pennsylvania Co. *vs.* Ellett, 132 Ill., 654, 24 N. E., 559; Stephens *vs.* Railroad Co., 36 Iowa, 327; Bower *vs.* Railroad Co., 42 Iowa, 546; Railroad Co. *vs.* Lee, 71 Tex., 558, 9 S. W., 604. * * *

If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it
415 seems difficult to conceive its absence of liability in any event, except perhaps where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of the railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its tracks and station houses in safe condition? In truth we do not know of any duties of a railway corporation which are of a private character. * * *'

By its acceptance of the franchise conferred by the State the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road, where the corporation still retains its existence and the enjoyment of its franchises in the rents. For such grants are strictly construed, and, as against the public, are never extended by construction. In the case before us there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises

in the fruits of the contract. There is nothing in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchise, or permitting it, while enjoying them or their fruits, to be acquit of responsibility for their abuse,
416 without regard to the financial ability of the lessee or his amenability to suit."

But it is said that this responsibility of the lessor does not apply to the employés of the lessee of the road; that the lessor owed no duty to them and that they are not members of the public in the sense used in the decisions on that subject.

It is true that the courts, in part have made this distinction; but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property; but holds the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, &c.

In the case of Swice's Admx. *vs.* Maysville & B. S. Ry. Co., 116 Ky., 253, this distinction was recognized to be the true rule.

The case of Charles A. Lee *vs.* Southern Pacific Railroad Company, 38 L. R. A., 71 appears to have been well considered and the authorities carefully collated. In that opinion the court said:

"In Nugent *v.* Boston, C. & W. R. Co. 80 Me. 62, the defendant railroad, under express authority of law, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland
417 & Ogdensburg sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: 'Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, &c., the charter company cannot, in the absence of stat-ory exemption, discharge itself of legal responsibility.' In Arrowsmith *vs.* Nashville & D. R. Co., 57 Fed. Rep. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict. An analysis of the case of East Line & R. R. Co. *vs.* Culberson, 72 Tex. 375, 3 L. R. A. 567, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not a- variance with the principle above mentioned, but embodies a distinct recognition of it. In that case an employee of the operating company sued the lessor com-
418 pany, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company.

The court held, and very properly, that such an action would not lie against the lessor company, and said: 'It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road.'

In all cases where a valid lease is found (or as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of relationship of employer and employee under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employee of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employee of the operating company by reason of the negligence of a fellow servant, or of want *and*
419 care of the lessor company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But, where injury has resulted to an employee of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employee may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employee and employer, or any relation of contractual privity, exists. As is said in Nugent *vs.* Boston & M. R. Co. 80 Me. 62, where the brakeman of the lessee road was injured by reason of the defective construction of the station house by the charter company: 'Our opinion, therefore, is that the plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and repass by the Bethlehem station house of the defendant which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant, having resulted in a personal injury to the plaintiff without fault on his part, he is entitled to maintain this action therefor.' So, here, the charge against the defendant is
420 that the injury resulted by reason of its imperfect construction and maintenance of the rails and tracks of its road. The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence, and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it."

This case is very similar to the one at bar, in which it was alleged

and proven that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe road bed.

In the cases of the Illinois Central R. R. Co. *vs.* Coley, 28 Ky. L. R., 336; Dudley *vs.* Illinois Central R. R. Co., 29 Ky. L. R., 1029 and P. A. Underwood's Admr. *vs.* Illinois Central R. R. Co., delivered June 14, 1907, this court recognized the rule to be that, although, the petition for removal of the case failed to allege any jurisdictional facts, which would authorize the removal of the case, yet if on the trial it is developed that the plaintiff in the action had not reasons for believing that the resident defendants in the action were responsible to him in damages, and it is made evident that their joinder as defendants with the nonresident, was made for the purpose of depriving the Federal court of jurisdiction to try the case, then this court will reverse and remand with directions to the lower court to remove the case to the Federal court. But the case at bar does not come within this principle. The appellee not only had
421 reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it.

At the close of the evidence, and when the court gave peremptory instructions in behalf of the resident corporation and F. J. Durbin, appellant, Illinois Central R. R. Co. again filed its petition and bond and asked for a removal of the case to the Federal court, which motion the court overruled, and in our opinion properly. Instead of the evidence showing an improper joinder of defendants it made it plain that the joinder was proper.

For these reasons the judgment of the lower court is affirmed. Whole Court sitting.

H. D. ALLEN,
TRABUE, DOOLAN & COX,
J. M. DICKINSON,
LOCKETT & LOCKETT,
For Appellant.

HENDRICK — MILLER,
P. B. MILLER,
For Appellee.

422 Be it remembered afterwards on the 25th day of November, 1907, there was filed in the Office of the Clerk of the Court of Appeals a Petition for Writ of Error, and an Assignment of Errors, and which is hereto attached as follows:—

423 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,

v.

ROBERT W. SHEEGOG, Administrator of the Estate of John E. Sheegog, Deceased, Defendant in Error.

Petition for Writ of Error and Assignment of Errors.

The above named Illinois Central Railroad Company, of the State of Illinois, conceiving itself aggrieved by the decision made and judgment rendered by the Court of Appeals of Kentucky in the cause of the above named plaintiff in error against the above named defendant in error in said court at its April Term, A. D. 1907, *to-wit*, on the 20th day of June, A. D. 1907, said court being the highest court of the State of Kentucky and the court of last resort of said State for the hearing and determination of said cause, in which cause the plaintiff in error claimed immunity and privilege of exemption from trial in the State Court of the Commonwealth of Kentucky, *towit*, the Union Circuit Court and the Court of Appeals of Kentucky upon appeal from said Union Circuit Court, and claimed the right and privilege of trial in the United States Circuit Court for the Western District of Kentucky under and by virtue of the provisions and guaranties of the Constitution of the United States, and especially Article III Section 2 thereof, and the Act of Congress approved on the Third day of March, A. D. 1875, as amended the Third day of March, A. D. 1887, and re-enacted the Thirteenth day of August, A. D. 1888, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes," and the decision, of said highest court of said State, *towit*, the said Court of Appeals of Kentucky, as well as the said Union Circuit Court was against the right specially set up and claimed under the
424 Constitution of the United States by said plaintiff in error, the said right specially claimed and set up being the right of plaintiff in error to remove to said United States Circuit Court for the Western District of Kentucky a certain action instituted in the Union Circuit Court by the said Robert W. Sheegog, Administrator of the estate of said John E. Sheegog, deceased, against plaintiff in error for the recovery of the sum of Twenty-five Thousand ($25,000.00) Dollars, the said right claimed, as aforesaid, by plaintiff in error being denied as aforesaid by said State Court;

Presents herewith its assignment of errors and prays for a writ of error to issue out of the Supreme Court of the United States to said Court of Appeals of Kentucky to the end that the record in said matter may be removed to the said Supreme Court of the United States, and the errors complained of by plaintiff in error may be

examined and corrected and the judgment aforesaid of said Court of Appeals may be reviewed and reversed.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed Nov. 25, 1907.
ED. C. O'REAR,
Chief Justice, Court of Appeals of Kentucky.

Filed Nov. 25, 1907.
J. MORGAN CHINN, *C. C. A.*

425 Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiff in Error,
v.
ROBERT W. SHEEGOG, Administrator of the Estate of John E. Sheegog, Deceased, Defendant in Error.

Assignment of Errors.

Plaintiff in error, Illinois Central Railroad Company, of the State of Illinois, feeling itself aggrieved by the findings and judgment of the Court of Appeals of Kentucky in the above entitled cause, comes by its counsel and assigns errors thereto as follows, *to-wit:*

I.

The said Court of Appeals of Kentucky erred in affirming the judgment of the Union Circuit Court refusing to surrender jurisdiction of this case upon the petition for removal and bond with surety being filed in said court for the removal of said action to the Circuit Court of the United States for the Western District of Kentucky and proceeding with the trial of and trying said cause and rendering judgment therein notwithstanding the said petition and bond for removal and the removal of said action to said United States Circuit Court.

II.

The said Court of Appeals of Kentucky erred in holding and deciding that the cause aforesaid was not removed to the said United States Circuit Court for the Western District of Kentucky upon the filing of the petiton for removal and bond with surety as required by the Act of Congress in such cases made and provided and in holding and deciding that the said State Court might nevertheless inquire into the truth of the allegations of the petition for removal and especially might try and determine the allegations made
426 by plaintiff in error of fraud in the joinder of the Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin as co-defendants in said State Court with said plaintiff in error.

III.

The said Court of Appeals of Kentucky erred in holding and deciding that the Chicago, St. Louis & New Orleans Railroad Com-

pany aforesaid joined as co-defendant with plaintiff in error, as aforesaid, was not joined in said action as a defendant for the fraudulent purpose of preventing a removal of said action to the United States Circuit Court for the Western District of Kentucky, and erred in refusing to hold and decide that it was joined as a co-defendant of plaintiff in error for the fraudulent purpose of preventing a removal of said action to said United States Circuit Court.

IV.

The said Court of Appeals of Kentucky erred in holding and deciding that the allegations of defendant in error in his petition against plaintiff in error and its co-defendants aforesaid that the derailment of the engine causing the death of decedent John E. Sheegog was the proximate result of defect of the track and roadbed of the Chicago, St. Louis & New Orleans Railroad Company, the lessor of plaintiff in error, was not a fraudulent pretense and pretext to prevent removal of said action to the Federal Court, but that the defective condition of the track of the said lessor Chicago, St. Louis & New Orleans Railroad Company was the proximate cause of the derailment of said engine and death of said John E. Sheegog; and in failing and refusing to hold and decide that a collision of said engine with a mule upon said track was the proximate cause of the derailment of said engine and death of said John E. Sheegog and that the claim of defect in the track was immaterial and irrelevant to the real cause of said derailment and death and was a false and fraudulent pretext invented and asserted solely in order to
427 assist in stating a cause of action against a Kentucky corporation to avoid removal of said case to the said United States Circuit Court.

V.

The said Court of Appeals of Kentucky erred in holding and deciding that the question of negligence upon which the cause of action against the Chicago, St. Louis & New Orleans Railroad Company was by defendant in error made to rest was not a jurisdictional fact and could not be inquired into on the trial of the question of removal.

VI.

The said Court of Appeals of Kentucky erred in holding and deciding that defendant in error in his petition aforesaid against plaintiff in error and its co-defendants stated a cause of action against them upon a liability which was joint; and erred in holding and deciding that the cause of action, if any, supposed to be stated against plaintiff in error was not separable from that, if any, supposed to be stated against the Chicago, St. Louis & New Orleans Railroad Company, and that, if any, supposed to be stated against F. J. Durbin the basis of the cause of action, if any, against plaintiff in
428 error being its violation of its obligation to decedent as master, the basis of the cause of action, if any, against the Chicago, St. Louis & New Orleans Railroad Company being not its tort but its supposed liability arising out of its lease of its railroad to

plaintiff in error, and the basis of the cause of action, if any, against said Durbin being his failure to prevent the derailment of the engine.

VII.

The said Court of Appeals of Kentucky erred in holding and deciding that the petition for removal was technically defective in failing to comply with Section 119 of the Civil Code of Practice of the State of Kentucky, said Code being simply a collection of Statutes enacted by the Legislature of the State of Kentucky regulating the practice in civil cases in the State Courts of said State.

VIII.

The said Court of Appeals of Kentucky erred in holding and deciding that the cause aforesaid did not become removable upon the action of the trial or Circuit Court of the State in directing a verdict for plaintiff in error's co-defendants, the Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin.

EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Filed Nov. 25, 1907.
J. MORGAN CHINN, *C. C. A.*

Filed Nov. 25, 1907.
ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

429 Filed Nov. 25, 1907.

J. MORGAN CHINN,
Clerk of Court of Appeals.

430 And on said date there was filed in the Office of the Clerk of the Court of Appeals, a Writ of Error to the Supreme Court of the United States, and the order allowing same, and which is attached hereto as follows:

431 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky, being the highest court of law or equity of the said State of Kentucky in which a decision could be had in the said suit between the Illinois Central Railroad Company of the State of Illinois, plaintiff, and Robert W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, defendant, wherein the plaintiff in error claimed an immunity, right and privilege under and in pursuance of the Constitution of the United States and especially Article III, Section 2 thereof, and the Act of Congress passed in pursuance thereof ap-

proved on the 3rd day of March, A. D. 1875, amended the 3rd day of March, A. D. 1887, and re-enacted the 13th day of August, A. D. 1888, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State Courts, and for other purposes," and the decision was adverse to and against the right, privilege and immunity specially set up and claimed by plaintiff in error under the said Constitution and Act of Congress, a manifest error hath happened to the great damage of the said Illinois Central Railroad Company of the State of Illinois as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 24th day of December, A. D. 1907 in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause
432 further to be done therein, to correct that error, what of right and according to the laws and *exemptions* of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 25th day of November in the year of our Lord, one thousand nine hundred and seven.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the United States Circuit Court,
Eastern District of Kentucky, at Frankfort,
Per E. H. COLEMAN, *Deputy Clerk.*

Allowed by

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Filed November 25th, 1907.

J. MORGAN CHINN,
Clerk of Court of Appeals.

Filed Nov. 25, 1907.

J. MORGAN CHINN, *C. C. A.*

433 And on said date there was filed a Writ of Error bond in the Clerk's Office of the Court of Appeals, which is in words and figures as follows towit:—

Court of Appeals of Kentucky.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plaintiff in Error,

v.

ROBERT W. SHEEGOG, Administrator of the Estate of John E. Sheegog, Deceased, Defendant in Error.

Bond.

Know all men by these present-: That the Illinois Central Railroad Company, principal, and Edmund F. Trabue, surety, are held and firmly bound unto the above named Robert W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, in the sum of Twelve Thousand ($12,000.00) Dollars, to be paid to the obligee herein, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our successors, executors, heirs and administrators firmly by these presents:

434 Sealed with our seals and dated the 25th day of November, A. D. 1907.

ILLINOIS CENTRAL RAILROAD COMPANY.

[SEAL.] By ALFRED H. EGAN, *Superintend-t.*

Attest:
GEO. T. ROOCER.

[SEAL.] EDMUND F. TRABUE.

Whereas, the above named Illinois Central Railroad Company of the State of Illinois has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered on the 20th day of June, A. D. 1907, by the Court of Appeals of Kentucky in the case of the said Illinois Central Railroad Company, of the State of Illinois against the said Robert W. Sheegog, Administrator of the estate of John E. Sheegog, deceased:

Now, therefore, the condition of this obligation is such that if the above named Illinois Central Railroad Company, o the State of Illinois, shall prosecute its said writ of error to effe and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

Sealed in the presence of us this the 25th day of November, A. D. 1907.

——— ———.
——— ———.

435 Approved by me this the 25th day of November, 1907.

ED. C. O'REAR,
Chief Justice Court of Appeals of Ky.

Filed Nov. 25, 1907.
J. MORGAN CHINN, *C. C. A.*

436 And afterwards on the 7th day of December, there was filed in the Office of the Clerk of the Court of Appeals, the original Citation and proof of service endorsed thereon and which is as follows:

437 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Robert W. Sheegog, Administrator of John E. Sheegog, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Kentucky, wherein the Illinois Central Railroad Company, of the State of Illinois, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 25th day of November, A. D. 1907, and of the Independence of the United States the one hundred and thirty-first.

ED. C. O'REAR,
Chief Justice of the Court of Appeals of Kentucky.

Attest:
J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

STATE OF KENTUCKY, *Muhlenberg County, ss:*

I, J. A. Shaver, Sheriff of Muhlenberg County, hereby certify that on the 26 day of November, A. D. 1907, I executed the within citation upon Robert W. Sheegog, the defendant in error named in the foregoing citation in said County, he being a resident of said County and personally known to me.

In Testimony Whereof witness my official signature this the 20 day of November, A. D. 1907.

J. A. SHAVER, *S. M. C. A.*
By C. E. BLACKWELL, *D. S.*

Copy of the within citation received this the 29th day of November, A. D. 1907.

HENDRICK & MILLER,
Counsel for Defendant in Error.

Filed Dec. 4, 1907.
J. MORGAN CHINN, *C. C. A.*

438 COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

In obedience to the command of the within Writ, I, J. Morgan Chinn, Clerk of the Court of Appeals of the Commonwealth of Kentucky, herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record, of the within entitled cause, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at the Capitol at Frankfort, on this the 16" day of December, A. D. 1907.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

Endorsed on cover: File No. 20,944. Kentucky court of appeals. Term No. 541. Illinois Central Railroad Company of the State of Illinois, plaintiff in error, *vs.* Robert W. Sheegog, administrator of the estate of John E. Sheegog, deceased. Filed December 21st, 1907. File No. 20,944.

/6

Supreme Court, U. S.
FILED.
NOV 1 1909
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY, OF THE STATE OF ILLINOIS. - - *Plaintiff in Error,*

vs.

ROBERT W. SHEEGOG, Administrator of JOHN E. SHEEGOG, Deceased. - - *Defendant in Error.*

NOTICE,
MOTION
and EXHIBIT.

WESTERFIELD & BECKER, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1909.

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY,
OF THE STATE OF ILLINOIS, - - - *Plaintiff in Error,*

vs. NOTICE OF APPLICATION.

ROBERT W. SHEEGOG, ADMINISTRATOR
OF THE ESTATE OF JOHN E. SHEEGOG,
DECEASED, - - - - - - - - - *Defendant in Error.*

The defendant in error is hereby notified that the plaintiff in error will on Monday, 8th day of November, A. D. 1909, upon its written motion and the transcript of the proceedings in this cause had in the United States Circuit Court for the Western District of Kentucky, at the opening of the court on that date, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of said transcript are herewith delivered to you) to the Supreme Court of the United States in its court-room at the Capitol, in the City of Washington, D. C.

BLEWETT LEE,
EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

Service of the foregoing notice is hereby acknowledged, and receipt of copy of said motion and of said transcript is hereby acknowledged this.....day of October, A. D. 1909.

JOHN G. MILLER,
Counsel for Defendant in Error.

Supreme Court of the United States

October Term, 1909.

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY,
OF THE STATE OF ILLINOIS, - - - *Plaintiff in Error,*

vs. MOTION.

ROBERT W. SHEEGOG, ADMINISTRATOR
OF THE ESTATE OF JOHN E. SHEEGOG,
DECEASED, - - - - - - - - - *Defendant in Error.*

Plaintiff in error moves the court for leave to file herein a transcript of the proceedings in the Federal Court to which this case was removed, had in such court after such removal, including a final judgment (May 2, 1905) rendered in favor of plaintiff in error about two months after the rendition of the final judgment against plaintiff in error in the State Court (March 23, 1905), to be considered by this court upon the hearing of the writ of error herein, upon the ground that the case in the Federal Court was the same as the case in the State Court, and the judgment of the Federal Court not being reversed

is conclusive against the jurisdiction of the State Court under the decision lately made by this court in Chesapeake & Ohio R'y Co. v. McCabe, Admx., 213 U. S. 207; and if not admissible upon such ground upon the hearing of this writ of error, then plaintiff in error prays leave to file such transcript of such judgment of said Federal Court to be considered as a precedent, or authority in point, upon the question involved in the determination of the writ of error herein, such decision of the Federal Court not being published in the Federal Reporter or other law publication, and being an express ruling that the cause herein was removable, and that plaintiff in error was not liable to defendant in error upon the supposed cause of action sued on herein; and plaintiff in error tenders herewith a printed and certified copy of the proceedings in the Federal Court, marked "**Exhibit.**"

The facts of the case are, briefly, that this case is here upon a writ of error to the highest court of the State of Kentucky which affirmed a judgment of the Circuit Court of Union County, Kentucky, refusing to surrender jurisdiction to the Federal Court upon petition and bond for removal filed by plaintiff in error, and rendering a judgment against plaintiff in error for $8,250.00, March 23, 1905. The Federal Court, on May 2, 1905, as appears by the transcript of its proceedings now tendered herewith, rendered a judgment in favor of plaintiff in error.

The State trial court claimed the right to retain jurisdiction of the cause because of the joinder as petitioner's co-defendants of a Kentucky corporation and an individual, citizen of Kentucky, in *favor of* which co-defend-

ants the State Court peremptorily instructed the jury on the same trial wherein its judgment was rendered against plaintiff in error for $8,250.00.

BLEWETT LEE,
EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

EXHIBIT.

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PROCEEDINGS OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY, AT A REGULAR TERM BEGUN AND HELD IN FEDERAL COURT HALL IN THE CITY OF LOUISVILLE, ON MONDAY, MAY 2, A. D., 1905.

Present: Honorable Walter Evans, sitting as Circuit Judge.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, DECEASED, - - - - - - - *Plaintiff*,

vs. No. 152.

ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, AND F. J. DURBIN, - - - *Defendants.*

BE IT REMEMBERED, That heretofore, to-wit, on the 18th day of April, A. D. 1904, came the defendants and filed a transcript of record from the Union Circuit Court, and this case is hereby transferred to our Circuit Court at Owensboro, Kentucky.

The transcript of record above referred to is as follows:

STATE OF KENTUCKY, }
COUNTY OF UNION. }

Please before the Honorable John L. Dorsey, Judge of the Union Circuit Court, in the Fifth Judicial District,

in the State of Kentucky, at the Court House, in the City of Morganfield, County of Union, and State of Kentucky, and on the dates hereinafter mentioned.

R. W. SHEEGOG, ADMR., ETC., - - - - - - *Plaintiff*,

vs.

ILLINOIS CENTRAL RAILROAD CO., CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, AND F. J. DURBIN, - - - - - *Defendants.*

BE IT REMEMBERED, That, heretofore, to-wit, on the 28th day of October, 1903, came the plaintiff, R. W. Sheegog, Admr., by counsel, and filed his petition herein.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG, DECEASED, - - - - - - - - - - - *Plaintiff*,

vs. PETITION.

ILLINOIS CENTRAL RAILROAD CO., CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, AND F. J. DURBIN, - - - - - *Defendants.*

The plaintiff says that the Illinois Centeral Railroad Company is a corporation organized under and by virture of the laws of the State of Illinois, and as such is engaged

in operating and conducting a general railroad business in the State of Kentucky, and was at all times hereinafter mentioned and r*efered* to, engaged in operating and conducting a railroad and general railroad business, through the County of Union and State of Kentucky, and likewise through many other counties of said State, that as such corporation it has power to sue and be sued, contract and and be contracted with, and to do any and all things which *is* natural person might do if engaged in similar business.

The plaintiff further states that the Chicago, St. Louis & New Orleans Railroad Company is a domestic corporation, and was organized and created under and by virtue of the laws of the State of Kentucky, and is and was at all times hereinafter mentioned a Kentucky corporation, with power to sue and be sued, contract and be contracted with, and, as such corporation, the said Chicago, St. Louis & New Orleans Railroad Company became the owner and controller of the line of railroad through Union County, Kentucky, upon which the injuries hereinafter complained of occurred; that after the said defendant, the Chicago, St. Louis & New Orleans Railroad Company, became the owner of said line of railroad, it leased same to its co-defendant, the Illinois Central Railroad Company, by a written lease duly executed, signed, acknowledged, delivered and accepted by the said Illinois Central Railroad Company, which written lease was duly recorded in the proper offices in the State of Kentucky, and immediately went into effect between the corporate defendants, and thereafter the Illinois Central

Railroad Company undertook to, and has operated said railroad in and through said county.

The plaintiff further states that through the gross negligence and carelessness of the defendant, F. J. Durbin, and the aforesaid corporate defendant's, his intestate, J. E. Sheegog, was on the 7th day of May, 1903, injured to such extent that he did then and there immediately die; that at the time of the death of said John E. Sheegog he was a resident and domiciled in Muhlenberg County, and after his said death this plaintiff, who was the father of the said decedent, applied to the County Court of said county and was duly and legally appointed and qualified as the administrator of the estate of said decedent, and he immediately accepted said appointment and trust, and executed bond before said County Court of Muhlenberg County, for the faithful performance of his duty, which bond was duly approve and accepted by the County Court aforesaid, and this plaintiff immediately accepted said trust, and entered upon the discharge of his duties as such administrator, and is now the lawful administrator of said estate and is acting as such, *be* reason and virture of the aforesaid appointment and qualification which appears by the orders of said court, so appointing him filed as part of this petition, and marked for identification Exhibit No. 1.

The plaintiff further states that on the 7th day of May, 1903, his intestate was in the employment of the defendant, the Illinois Centeral Railroad Company, as its engineer, on one of its trains, and while in the performance of his duty as such engineer, the train upon which

he was so engaged, was, through the joint and gross negligence and carelessness of the three defend*ant's* herein, derailed and his intestate instantly thereby killed. At that time the defendant, the Chicago, St. Louis & New Orleans Railroad Company was the *O*wner of said roadbed, fences, right of way, trestles and bridges where said accident happened, and the Illinois Cent*e*ral Railroad Company was the lessee of said railroad property, and premises, and was the *O*wner of the engines and cars, trai— and appliances by which the said intestate was killed, and was operating said road, trains and engines, and the defendant, F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter Railroad Company, and in charge of said train and engine and appliances, and the said intestate was required to obey and was obeying and acting under the orders of the said defendant, F. J. Durbin.

The plaintiff now says that by the negligence of both of said Railroad Company's defendan*t's* hereti the said road bed, rails, trac*t*, cattle guards, ties, fence and right of way of the said railroad was allowed to be and for a long time had been in a weak, rotten, ruinous and defective, and improper condition, and by the negligence of the Illinois Central Railroad Company, its engine and cars were knowingly allowed to be and remain in an improper, defective and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and *the is* improper and dangerous condition of the said road premises and cars of the defendant's were known to the said defendant's, and at the time of

this is said wreck and accident same were being operated in a careless manner by all of said defendant's and the said Durbin by his negligence in running, ordering and directing said train contributed to cause the said accident; and the plaintiff says that the negligence of the defendant's in its maintenance of its tra*c*ts, road bed, engine, cattle guard, rails, ties, fences, e*c*t., as above set out, and together with the negligence of the said Illinois*c* Centeral Railroad Company, in directing and permitting its engine, cars and road to be operated while in a defective and dangerous condition, an*f*d the negligence of the said conductor, in ordering and directing the *runing* and management of said train, and in failing to give proper directions all together jointly caused said wreck and killed the plaintiff's said intestate who was a young *vogorous* man, an excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects and making and saving large quantities of money; and by the negligence of the said defendant in thus causing the death of the said intestate, John E. Sheegog, the plaintiff has been damaged in the sum of Twenty Five Thousand Dollars ($25,000.00).

WHEREFORE, plaintiff prays judgment against the defendant for Twenty Five Thous*an* Dollars ($25,000.00) for costs herein expended, and for all proper relief.

Hendricks & Miller Attys for Plff—

The Commonwealth of Kentucky.
To the Sheriff of Henderson County, Greeting:

You are commanded to summons Chicago, St. Louis

& New Orleans Railroad Company to answer in twenty days after the service of this summons, a petition filed against it in the Union Circuit Court by R. W. Sheegog, *Adrm.* of Jno. E. Sheegog, Decd. and warn it that upon its failure to answer, the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons within twenty days after the service thereof to the clerk's office of said Court, this 22 day of Oct. 1903.

J. E. Lilly, Clerk of the Union Circuit Court.
By Jno. H. Wall, Deputy Clerk.

Executed on the within Railroad Company by delivering a copy of this summons to E. F. Coons Agent and chief officer of said railroad Company in Henderson County this Nov. 4th, 1903.

Henry Dixon, S. H. C.
By Ed Milton, D. S.

Executed on the within named F. J. Durbin by delivering him a copy Dec. 30, 1903.

Henry Dixon, S. H. C.
By R. W. Dixon, D. S.

The Commonwealth of Kentucky.

To the Sheriff of Union County, Greetings:

You are commanded to summon Illinois Central Railroad Company to answer in 10 days after the service of this summons, a petition filed against it, in the Union Circuit Court by R. W. Sheegog, Admr. of John E. Sheegog, Deceased, and warn it upon its failure to answer the

petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due returns of this summons within 10 days after the service thereof to the clerk's office of said Court.

Given under my hand as clerk of said Court, this 22 day of Oct. 1903.

J. E. Lilly, Clerk of Union Circuit Court.

Executed on Illinois Railroad Co. by delivering a copy of the within summons to J. McTichner, Agent at Morganfield, Ky. this 22nd day of Oct. 1903.

Wm. M. Berry, S. U. C.

By Reese Berry, D. C.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG, DECEASED, - - - - - - - - - - *Plaintiff,*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, AND F. J. DURBIN, - - - *Defendants.*

PETITION TO REMOVE THIS CASE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

Your petitioner, Illinois Central Railroad Company, states that it is one of the defendants in the above entitled action; that the matter *is* dispute therein, *exclusive* of interest and costs, exceed the sum or value of $2000.00. That such action is of a civil nature, wherein the plaintiff, R. W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, claims the right to recover damages in the sum of $25000 for the said John E. Sheegog, deceased, by reason of the derailment of one of your petitioner's trains upon which the said John E. Sheegog, deceased, was acting as Engineer, through the negligence of your petitioners and its co-defendants, Chicago, St.

Louis & New Orleans Railroad Company and F. J. Durbin all of which claims of damage or negligence your petitioner will controvert.

Your petitioner states that in the above mentioned action there is a controversy which is wholly between citizens of different States, and which can be fully detirmined between them without the presence in said action of your petitioner's co-defendant, Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin as parties thereto, or either of them, which said *was* controversy is between your petitioner who avers that it was at the time of the commencement of this action and still is a Corporation created by an*f* organized under and pursuant to the laws of the State of Illinois, and not under or pursuant to the laws of the State of Kentucky, having its principal place of business in the City of Chicago, and in said State of Illinois, and a citizen of the State of Illinois, and not a citizen of the State of Kentucky, and the plaintiff, R. W. Sheegog, Administrator of the estate of John E. S*r*eegog, deceased, who was *it* the time of the commencement of this action and is now a citizen and resident of the State of Kentucky, and both said plaintiff and your petitioner are a*ccually* interested in said controversy which is substantially as follows:

Whether or not your petitioner as Employer of its co-defendant F. J. Durbin, is responsible in damages to the plaintiff as Administrator for the death of said John E. Sheegog, resulting from the derailment of one of your petitione*r*'s trains on the 7th day of May, 1903.

Your petitioner further states that it controverts the claim of any negligence of either its co-defendants, Chicago, St. Louis & New Orleans Railroad Company or F. J. Durbin or your petitioner.

Your petitioner controverts that any negligence contributing to or causing the said accident or death of plaintiff's decedent was a joint or concurrent negligence of your petitioner, the Chicago, St. Louis & New Orleans Railroad Co., or F. J. Durbin, and your petitioner charges that the petitioner joined the said Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin as co-defendants with your petitioner in this action for the purpose and solely for the purpose of preventing a removal of this action to the United States Circuit Court for the Western District of Kentucky. Petitioner, Illinois Central Railroad Company admits that its co-defendant, Chicago, St. Louis & New Orleans Railroad Company is empowered to construct and to lease to your petitioner its Railroad mentioned in plaintiff's petition, and says that it was so empowered by act of the General Assembly of the Commonwealth of Kentucky long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which said Act of the General Assembly became a law on the 24th day of February, 1882, and is entitled

and that pursuant to such powers the Chicago, St. Louis & New Orleans Railroad Company bein/ the owner leased to your petitioner all of the railroad mentioned in the petition, and parted with all dominion over it, and that your petitioner has since said lease continuously

operated said railroad exclusively, and that said lessor has never at any time operated it, which is, and at the commencement of this action, and at all times was, well known to plaintiff.

Your petitioner says that plaintiff's decedent at the time he received the fatal injury complained of, was an employee of your petitioner, and not an employee of either of your petitioner's co-defendants, and was not and never had been an employee or in the employ of said lessor, or said F. J. Durbin, and that all the said facts were well known to plaintiff when this action was brought.

Your petitioner says that to avoid such removal to Federal Court of the action, plaintiff joined your petitioner's co-defendants, one a Kentucky corporation, and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was through joint and gross negligence and carelessness of all the defendants derailed and said decedent ins*tatly* killed, and falsely and fraudulently alleged that by the negligence of both of defendant's road-bed, rails, track, cattle guards, fences and right of way of the said railroad was allowed to be and for a long time had been in a weak, rotten ruinous, defective and improper condition, and by the negligence of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road premises and cars of the defendants was known to the defendants,

and that at the time of the wreck and accident the same were being operated in a careless manner by all of the defendants, and the defendant, Durbin by his negligence in running, ordering and directing said train contributed to cause said accident, and that the negligence of the defendant in its maintenance of its track, road-bed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with the negligence of your petitioner in directing and permitting its engine cars and road bed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions altogether caused said wreck and killed said decedent, when the plaintiff well knew that such allegations were untrue, and plaintiff did not expect to establish such allegations, and did not make them for the purpose of proving them at the trial or of substantiating his cause of action therewith, but made them solely for the purpose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal Court. Your petitioner offers herewith a Bond with good and sufficient surety for its entering in said Circuit Court of the United States for the Western District of Kentucky on the first day of its next session, a copy of the record in this case, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto.

And it *pray* this Court to proceed no further herein except to accept this petition and approve said *surty* and bond.

H. D. Allen
Pertile & *Tirdue* For Petitioners.

State of Kentucky County of Union—S*et.*

J. McTichner says he is the chief officer and the agent of the Illinois Central Rail*d*oad Company residing in Union County Kentucky and that he believes the statements contained in the foregoing petition are true.

J. M. McTichner.

Subscribed and sworn to before me by J. McTichner this November 2nd, 1903.

G. B. Allen,
Examiner for Union County, Kentucky.

IN THE UNION CIRCUIT COURT, UNION COUNTY, STATE OF KENTUCKY.

R. W. SHEEGOG, ADMINISTRATOR OF JNO. E. SHEEGOG, DECEASED, - - - - - - - *Plaintiff,*

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, CHI*acgo*, ST. LOUIS & NEW *orleans* RAILROAD COMPANY, AND F. J. DURBIN, - - - *Defendants.*

Know all men by these presents that we, the Illinois Central Railroad Company as principal, and H. D. Allen as surety are held and firmly bound unto R. W. Sheegog, Administrator of Jno. E. Sheegog, deceased and unto all other persons whom it may concern in the penal sum of two hundred and fifty dollars for the payment of which well and truely to be made we bind ourselves, *ore* heirs, representatives and assigns, jointly and severally firmly by these presents:

YET UPON THESE CONDITIONS: The Said Illinois Central Railroad Company having petitioned the Union Circuit Court of Union County, State of Kentucky, for the removal of a certain cause therein pending wherein R. W. *Shegog*, Administrator of Jno. E. Sheegog, is plaintiff, and the Illinois Central Railroad Company, Chicago, St. Louis & New Orleans Railroad Company and

F. J. Durbin are defendants, to the Circuit Court of the United States in and for the Western District of Kentucky.

Now if said Illinois Central Railroad Company, your petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 2nd day of November, A. D. 1903.

Illinois Central Railroad Company,
By H. D. Allen, Atty.
H. D. Allen, Surety.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, - - - - - - - - - - *Plaintiff,*

vs.

ORDER.

ILLINOIS CENTRAL RAILROAD COMPANY, ETC., - *Defendants.*

This day came the defendant, Illinois Centeral Railroad Company, and tendered and offered to file its petition and bond, the surety in which was adjudged by the Court as solvent and good for the amount thereof, and moved the Court to remove this cause to the United States Circuit Court for the Western District of Kentucky, and the plaintiff objects to the filing of said petition and bond, and the Court being advised overruled said objection and ordered said petition and bond to be filed which was done, to which the plaintiff excepted, and the Court being advised declined to accept said bond and *overuled* the motion to approve same and overruled the petition and motion for the removal of this cause to said United States Circuit Court, but adjudges this cause not so removable and adjudges that this Court has jurisdiction of this cause and retains same, to which ruling of the Court the said defendant Illinois Centeral Railroad Company objects and excepts and prays an appeal to the Court of Appeals, which is granted.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMINISTRATOR OF *jno* E. SHEEGOG, - - - - - - - - - - *Plaintiff,*

vs. ANSWER OF I. C. R. R. CO.

ILLINOIS CENTERAL RAILROAD CO., ETC., - *Defendants.*

The defendant Illinois Central Railroad Company objects to this Court proceeding further in this cause on the ground that since filing its petition and bond for removal to the Circuit Court of the United States for the Western District of Kenucky the jurisdiction of this Court herein has ceased and under protest it makes and files its separate answer to the plaintiff's petition herein. It denies that *though* the gross negligence of itself or of its co-defendants, Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin, J. E. Sheegog was on the 7th day of May, 1903, or at any other time injured to such an extent that he did then and there immediately die; denies that on said date and while in the employment of this defendant as engineer on one of its trains the said train on which he was so engaged was *though* the negligence of this defendant or either of its co-defendants or *though* the joint and gross negligence and carelessness of all the defendants herein derailed or plaintiff's intestate thereby instantly killed; denies that plaintiff's intestate at the

time of his death was required to obey or was obeying or acting under the orders of the defendant J. F. Durbin; denies that by the negligence of itself or of its co-defendant Railroad Company or that by the negligence of either of them the said road bed, rails, tracks, cattle guards, ties, fences or right of way of the defendant or its co-defendant Railroad Company were allowed to be and for a long time had been in a *weeck*, rotten, ruinous, defective or improper condition, and denies that by the negligence of this defendant its engine and cars were knowingly allowed to be or remain in an improper, defective or dangerous condition, or its said engine or cars to be constructed as to be in a dangerous condition, denies that such improper and dangerous condition of the said road, premises or cars of the defendants if it existed was known to this defendant or either of its co-defendants, and denies at the time of the wreck and accident complained of by plaintiff the same were being operated in a careless manner by all or any of the defendants hereto; denies that the defendant Durbin was negligent in running, ordering and directing said train, and denies that by such negligence he contributed to cause the said *acident* and denies that the said wreck and the killing of plaintiff's intestate were caused by the negligence of this defendant in its maintenance of its track, road, bed, engine, cattle guards, rails, ties, fences &c., or that such alleged negligence together with the negligence of this defendant in directing or permitting its engine, sars or road to be operated while in a defective or dangerous condition or the negligence of the said conductor in ordering and directing the management

of said train or in failing to give proper directions, but says there was no such negligence on the part of this defendant and its co-defendants, or any of them.

This defendant has no knowledge sufficient to form a belief as to whether plaintiff's intestate was making and saving large quantities of money, and it denies that in the death of his intestate plaintiff has been damaged in the sum of $25000.00 or any sum. This defendant says the derailment and wrecking of said train by reason of which plaintiff's intestate was killed, was caused solely by collision of the train with a mule which, without fault or carelessness upon the part of this defendant, strayed upon its road-bed and track, and which collision resulted from the negligence of plaintiff's intestate in failing to discover the said mule in time to avoid stricking it, or in negligencely and carelessly failing to avoid collision with it after it was discovered by him and but for which negligence upon the part of plaintiff's intestate the said collision and the wrecking of the train resulting in his death would not have occurred, or if not caused by the negligence and carelessness of plaintiff's intestate the said collision was unavoidable, one or the other of which contentions is true, but defendant does not know which is true. The accident which resulted in the death of plaintiff's intestate was such as is incident to the operation of a railroad and plaintiff's intestate knew when he accepted employment with defendant that there was danger of such accidents under the most careful management of trains and contracted with defendant to assume the risks of such accidents and not to claim any damage from

defendant that might result to him from such accidents while engaged in the servise of defendant.

Wherefore defendant prays to be hence dismissed with its costs and for all proper relief.

H. D. Allen,

Attorneys for defendant.

UNION CIRCUIT COURT.

R. W. Shegog, Admr., *ect.*, - - - - - - *Plaintiff*,

vs. REPLY.

Illinois Central Railroad Company, *ect.*, - *Defendants*

Plaintiff for reply to defendants answer herein, says it is true that the train upon which his intestate was working and by the wrecking of which he was killed, did strike a Mule, and was thus thrown from the trac*t*, but he says that this was not without fault or carelessness upon the part of the defendants; he says that it was by negligence of the defendants in failing to maintain their fence on the side of the trac*t*, and their *catle-* guard at the termination of these fences at a public road, that the said Mule got upon the trac*t*. He says that there are fences along the line of the right *away* up to a public road, which crossess the trac*t* near the place where the Mule was struc*t*, and that at said publi*d* road, and at the ter-

mination of the said fences, the defendaat negligently failed to maintain a cattle, guard, and that the said animal went upon the track at that place; went down upon the track between said fences to the point where collision occurred; anf he denies that the collision resulted from yhe negligence of plaintiff's intestate in failing to discover the said mule in time to avoid striking it, or in negligently or carelessly failing to avoid collision with it after it w s discovered by him; and denies that said negligence existed, or that it caused the said wreck, but says that because of the negligence of the Illinois Central Railroad Company, defendant herein, in the construction of its engine and defendant's negligence in failing to keep said tract in proper condition, the said collision with the mule, wrecked the train, and that all these things, together with the negligence of all three of the defendants, as *alleged the petition* of plaintiff herein caused the said wreck, and the death of plaintiff's intestate, and but for the negligence of the defendants as alleged in the petition herein, all *actig* together, the *said would* not have occurred; and plaintiff denies that his intestate contracted with the defendant, or any of the defendants, to assume the risk of such accidents, and not to claim any damages from defendant that might result to him from such accidents while engaged in the service of the defendant. Wherefore he prays as in his petition.

Hendrick & Miller,

Atty. for Plff.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMR. &c., - - - - - - *Plaintiff*,

vs.

ORDER.

I. C. R. R. Co., &c., - - - - - - - *Defendants*.

This day came the defendant, Illinois Centeral Railroad Company, and by leave of the court filed its amended answer herein, also came said defendant and filed its motion to strike from plaintiff's reply, and without waiving the said motion also filed its re*joined* to said reply. Said motion to strike from plaintiff's reply is left open until the next term of this court, the plaintiff is given thirty days from this date to reply to defendant's amended answer and to surrejoin to its rejoinder, and this cause is continued.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, - - - - - - - - - - *Plaintiff,*

vs. AMENDED ANSWER OF I. C. R. R. CO.

ILLINOIS CENTRAL R. R. CO., ETC., - - - *Defendants.*

The defendant Illinois Central Railroad Company objects to this court proceeding further in this cause on the ground that since filing its petition and for bond removal to the Circuit Court of the United States for the Western District of Kentucky the jurisdiction of this court has *ceased* and under protest it makes and files its separate answer to the plaintiff's petition herein. It denies that through the gross or any negligence of itself or of Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin, co-defendants, or any of them, J. E. Sheegog was on the 7th day of May, 1903, or at any other time injured to such an extent that he did then and there die; denies that on said date or at any other time or while in the employment of this defendant, as engineer on one of its trains, the said train on which he was so engaged was through the negligence of this or either of its co-defendants, or through the joint gross negligence or carelessness of all three the defendants herein, derailed or plaintiff's intestate thereby killed; denies that plaintiff's intestate at the time of his death

was required to obey or was obeying or acting under the orders of the defendant F. J. Durbin; denies that by the negligence of itself, or of its co-defendant Railroad Company, or that by the negligence of either of them the said road bed, ra*lis*, tracks, cattle guards, ties fences or right of way of the defendant or its co-defendant Railroad Company were allowed to be and for a long time or at all had been or were in a weak, rotten, ruinous, defective or improper condition, and denies that by the negligence of this defendant its engine or cars were knowingly allowed to be or remain in an improper or defective or dangerous condition, or its said engine or cars to be so constructed as to be in a dangerous condition, denies that such improper or dangerous condition of the said road, premises or cars of the defendants, if it existed, was known to this defendant or either of its co-defendants, and denies that at the time of the wreck and accident complained of by plaintiff the same were being operated in a careless manner by all or any of the defendants hereto denies that the said defendant Durbin was negligent *of* running *on* ordering or directing said train and denies that by his negligent running ordering or directing said train he contributed to cause the said accident and denies that the said wreck and the killing of plainti intestate were caused by the negligence of this defendant in its maintenance of its track or road bed or engine or cattle guards or rails or ties or fences etc. or that such alleged negligence or the negligence of this defendant in directing or permitting its engine or cars or road to be operated while in a defective or dangerous condition, or the negligence of

said conductor in ordering or directing the management of said train, or in failing to give proper directions altogether or at all caused the said wreck and killing of plaintiff's intestate, but says there was no such negligence on the part of this defendant or its co-defendants or any of them. This defendant has no knowledge sufficient to form a belief as to whether plaintiff's intestate was making and saving large quantities of money and it denies that in the death of his intestate plaintiff has been damaged in the sum of $25,000.00 or any sum. This defendant says the derailment and wrecking of said train by reason of which plaintiff's intestate was killed was caused solely by collision of the train with a mule which, without fault or carelessness upon the part of this defendant, strayed upon its road bed and track, and which collision resulted from the negligence of plaintiff's intestate in failing to discover the mule in time to avoid striking it, or in negligently or carelessly failing to avoid collision with it after it was discovered by him and but for which negligence upon the part of plaintiff's intestate the said collision and the wrecking of the train resulting in his death would not have occurred, or if not caused by the negligence or carelessness of plaintiff's intestate the said collision was unavoidable, one or the other of which contentions is true, but defendant does not know which is true, The accident which resulted in the death of plaintiff's intestate was such as is incident to the operation of a railroad and plaintiff's intestate knew when he accepted employment with defendant that there was danger of

such accidents under the most careful management of trains and contracted with defendant to assume the risks of such accidents and not to claim any damage from defendant that might result to him from such accidents while engaged in the service of defendant.

Wherefore defendant prays to be hence dismissed with its costs and for all proper relief.

I. C. R. R. Co.,
By H. D. Allen, Atty.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMR. ETC., - - - - - *Plaintiff*,

vs. REJOINER.

I. C. R. R. Co., - - - - - - - - - *Defendants.*

Without waiving the motion filed herein to strike from plaintiff's reply the defendant Illinois Central Railroad Company for rejoinder denies that the mule with which this defendant's train came in contact on the occasion of the killing of plaintiff's intestate got upon the track by reason of the negligence of the defendants *of* any of them in failing to maintain a fence or fences on the side or sides of the track, or to maintain a cattle guard at the termination of such fence or fences or elsewhere; denies that the defendants or any of them negligently failed to maintain a fence or fences on the side or sides of the track, or

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a cattle guard at the termination of said fences at a public road or elsewhere; denies that the mule went up the track at such place, or that it went down upon the track between said fences to where the collision occurred, but says that if the said mule did go upon or down the track it was not by reason of any negligence upon the part of defendants or any of them in failing to maintain fences or cattle guard; *denis* that the engine of this defendant was negligently constructed, or that this defendant negligently failed to keep the track in proper condition, or that by reason of any such negligence the collision with the mule occurred, or the death of plaintiff's intestate caused, and denies that there was any such negligence upon the part of these defendants, or any of them.

Wherefore plaintiff prays as in its answer and amended answer.

I. C. R. R. Co.,
By H. D. Allen, Atty.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMR. ETC., - - - - - *Plaintiff,*

vs. MOTION.

I. C. R. R. Co., etc., - - - - - - - *Defendants.*

The defendant Illinois Centeral Railroad Company, moves the court to strike from the plaintiff's reply filed herein the following words, "But says that because of the negligence of the Illinois Centeral Railroad Company, defendant herein, in the construction of its engine and defendant's negligence in failing to keep said tract in proper condition, the said collision with the Mule wrecked the train, and that all these things together with the negligence of all three of the defendants, as alleged in the petition of plaintiff herein, caused the said wreck, and the death of plaintiff's intestate, and but for the negligence of the defendants as alleged in the petition herein, all acting together, the said wreck would not have occurred."

STATE OF KENTUCKY, }
COUNTY OF UNION. } Set.

I, J. E. Lilly, Clerk of the Union Circuit Court, do hereby certify that the foregoing 25 pages contain a full, true and complete transcript of the record and pro-

ceedings in the action wherein R. W. Sheegog, Admr., is plaintiff and Illinois Ce*nteral* Railroad Company, etc., are defendants, as the same appears of record and now on file in my office.

Witness my hand as clerk aforesaid this 1st day of April, 1904.

J. E. Lilly,
Clerk of the Union Circuit Court.

Transcript fee, $————.

And on May 2nd, 1904, the following proceedings were had:

R. W. Shegog, Admr.

vs.

Illinois Central Railroad Co.

This day came the parties by their attorneys, and, on their motion, it is ordered that this case be, and same is, hereby continued until the next term of this court.

And on November 29, 1904, the following proceedings were had:

R. W. Shegog, Admr.

vs.

Illinois Central Railroad Co.

This day came the plaintiff by Hendricks & Miller, his attorneys; came also the defendant, Illinois Central Railroad Company, by Locket & Locket, J. D. Atchison, C.

S. Walker and E. F. Trabue. The plaintiff, by his attorneys, filed his answer to the petition of the defendant, the Illinois Central Railroad Company, for removal herein, and also moved the Court to remand this case to the Union Circuit Court, from whence it came.

The motion of the plaintiff to remand this action to the Union Circuit Court was heard on the evidence offered and introduced by the parties respectively, and the Court not being fully advised thereof, takes time.

The answer of the plaintiff to the petition for removal filed by the defendant, Illinois Central Railroad Company, is as follows:

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF KENTUCKY, SIXTH CIRCUIT, OWENSBORO DIVISION.

R. W. SHEGOG, ADMR. OF JOHN E. SHEGOG, DECEASED, - - - - - - - - - - *Plaintiff,*

vs. MOTION TO REMAND.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., *Defendants.*

Now comes the plaintiff, R. W. Shegog, Admr. of John E. Shegog, deceased, and moves the Court to remand this case to the State Court, to-wit, the Union Circuit Court, from which it came, because this court has no jurisdiction over this action, or the parties thereto, as shown by the record filed herein.

II.

Plaintiff further says that two of the defendants, to-wit, The Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin, were citizens of the State of Kentucky at the time this action was filed, and at the time of the filing of the petition for removal from the Union Circuit Court.

III.

The bond offered by the petitioner, Illinois Central Railroad Company, for removal and accompanying its

petition for removal, was never approved by any court as good and sufficient.

IV.

The defendant, Illinois Central Railroad Company, the petitioner seeking a removal to this court, waived whatever right it may have had to remove by praying an appeal from the order of the Union Circuit Court, refusing to remove this case, and refusing to approve the bond, and by setting up and pursuing its defense in said court and the Court of Appeals of Kentucky, as shown by the record.

V.

The statements of the said petition asking to remove this case on account of the alleged fraudulent joinder of the co-defendants, F. J. Durbin and Chicago, St. Louis & New Orleans Railroad Company, are untrue.

Hendrick & Miller,
Attys. for Plff.

R. W. Shegog, Admr. of John E. Shegog, says the foregoing statements are true as he verily believes.

R. W. Shegog.

Subscribed and sworn to before me by R. W. Shegog, this November 28, 1904.

Edyth Palmer,
Ex. D. C.

And on December 8, 1904, the following proceedings were had:

R. W. SHEGOG, ADMR.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

It is ordered by the Court that the order of submission of this action on the plaintiff's motion to remand it to the State Court, entered herein on the 29th day of November, 1904, be, and it is now, set aside in order to allow the defendant, Illinois Central Railroad Company, to file an additional transcript of record from the State Court. Whereupon, on motion of said defendant, Illinois Central Railroad Company, leave to file such additional transcript is granted, and said additional transcript is accordingly filed, and said motion to remand is re-submitted for the judgment of the Court thereon, and the Court being clearly of opinion that the evidence adduced on the hearing of said motion fully and plainly established the truth of all averments made by the said defendant, Illinois Central Railroad Company, in its petition for a removal of this action to this Court, now overrules and denies the said motion to remand this action to the Union Circuit Court.

The plaintiff, by counsel, excepts to this judgment and ruling of the Court on said motion to remand and time to and including the 9th day of January, 1905, is given the plaintiff within which to render a bill of exceptions herein.

The additional transcript of record from the State Court above referred to is as follows:

STATE OF KENTUCKY, }
COUNTY OF UNION. }

Please before the Honorable John L. Dorsey, Judge of the Union Circuit Court, in the Fifth Judicial District, in the State of Kentucky, at the court house, in the City of Morganfield, County of Union and State of Kentucky, and on the dates hereinafter mentioned.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG, DECEASED, - - - - - - - - - - *Plaintiff*,

vs. TRANSCRIPT OF RECORD.

ILLINOIS CENTERAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY, AND F. J. DURBIN, - - - *Defendants.*

BE IT REMEMBERED, that heretofore, to-wit, on the 22nd day of October, 1903, came the plaintiff, R. W. Sheegog, Admr., etc., and filed their petition herein.

Said Petition is as follows, to-wit:

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG, DECEASED, - - - - - - - - - *Plaintiff*,

vs. PETITION.

ILLINOIS CENTERAL RAILROAD CO., CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY AND F. J. DURBIN, - - - *Defendants*.

The plaintiff says that the Illinois Centeral Railroad Company is a corporation organized under and by virtue of the laws of the State of Illinois, and as such is engaged in *opreating* and conducting a general railroad business in the State of Kentucky, and was at all times hereinafter mentioned and referred to, engaged in operating and conducting a railroad and general railroad business, through the County of Union and State of Kentucky, and likewise through many other Counties of said State, that as such corporation it has power to sue and be sued, contract and be contracted with, and to do any and all things which a natural person might do if engaged in similar business. The plaintiff further *sates* that the Chicago, St. Louis & New Orleans Railroad Company is a domestic corporation, and was organized and created under and by virtue of the laws of the *satet* of Kentucky, and is and

was at all times hereinafter mentioned a Kentucky corporation, with power to sue and be sued, contract and be contracted with, and as such corporation the said Chicago, St. Louis & New Orleans Railroad Company became the owner and controller of the line of railroad through Union County, Kentucky, upon which the injuries hereinafter complained of occurred, that after the said defendant, the Chicago, St. Louis & New Orleans Railroad Company, became the owner of said line of Railroad it leased same to its co-defendant, the Illinois Centeral Railroad Company, by a written lease duly executed, signed, acknowledged, delivered and accepted by the said Illinois Centeral Railroad Company, which written lease was duly recorded in the proper offices in the State of Kentucky, and immediately went into effect between *to* corporate defend*ant's* and thereafter the Illinois Centeral Railroad Company undertook to, and has operated said railroad in and through said County. The plaintiff further states that through the gross negligence and carelessness of the defendant, F. J. Durbin and the aforesaid corporate defendant's his intestate, J. E. Sheegog, was on the 7th day of May 1903, injured to such an extent that he did then and there immediately die: that at the time of the death of said John E. Sheegog he was a resident and domiciled in Muhlenberg County, and after his said death this plaintiff who was the father of the said decee*dant*, applied to the County Court of said County, and was duly and legally appointed and qualified as the administrator of the estate of said decedent, and he immediately accepted said appointment and trust, and

executed bond before said County court, of Muhlenberg County, for the faithful performance of his duty which bond was duly approved and accepted by the County Court aforesaid, and this plaintiff immediately accepted said trust, and entered upon the discharge of his duties as such administrator, and is now the lawful administrator of said estate and is acting as such, by reason and virture of the aforsaid appointment and qualification which appeared by the orders of said Court, so appointing him failed as a part of this petition, and marked for identification, Exhibit No. 1.

The plaintiff further states that on the 7th day of May 1903, his intestate was in the employment of the defendant, the Illinois Centeral Railroad Company, as its engineer on one of its trains, and while in the performance of his duty as such engineer, the trai upon which he was so engaged, was through the joint and gross negligence and carelessness of the three defendant's herein derailed and his intestate instantly thereby killed. At that time the defendant, the Chicago, St. Louis & New Orleans Railroad Company was the owner of said roadbed, fences, right of way, trestles and bridges where said accident happened, and the Illinois Centeral Railroad Company was the lessee of said Railroad property, and premises, and was the owner of the engine and cars, train and appliances, by which the said intestate was killed, and was operating said road trains ans engine, and the defendant F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter Railroad Company, and in charge of said train and engine and

appliances, and the said intestate was required to obey and was obeying and acting under the orders of the said defendant F. J. Durbin. The plaintiff now says that by the negligence of both of said railroad company's defendant's hereto the said road bed, rails, trac*t*, cattle guards, ties, fence and right of way of the said railroad was allowed to be and for a long time had been in a weak, rotten, ruinous and defective, and improper condition, and by the negligence of the Illinois Cent*e*ral Railroad Company, its engine and cars were knowingly allowed to be and remain in an improper defective and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road premises and cars of the defendant's were known to the said defendant's and at the time of this said wreck and accident same were being operated in a careless manner by all of said defendant's the said Durbin by his negligence in *runing ordereing* and directing said train contributed to cause the said accident, and the plaintiff says that the negligence of the defendant in its maintenance of its tracks, road bed, engine cattle-guard, rails, ties, fences *ect.*, as above set out, and together with the negligence of the said Illinois Cent*e*ral Railroad Company, in directing and permitting its engine, cars and road to be operated while in a defective and dangerous condition, and the negligence of the said conductor, in order*eign* and directing the *runing* and management of said train, and in failing to give proper directions all together jointly caused said wreck and killed the plaintiff's said

intestate who was a young vigorous Man, an excellent locomotive engineer, intelligent, sobor, industrious, of most excellent habits and prospects, and making and saving large quantities of money; and by the negligence od the said defendant in thus causing the death of the said intestate, John E. Sheegog, the plaintiff has been damaged in the sum of Twenty-five Thousand Dollars ($25,000.00).

WHEREFORE, plaintiff prays judgment against the defendants for twenty-five thousand dollars ($25,000.00), for costs herein expended, and for all other proper relief.

Hendrick & Miller Atty's for
Plaintiff

UNION CIRCUIT COURT.

STATE OF KENTUCKY, }
COUNTY OF UNION. }

Please before the Honorable John L. Dorsey, Judge of the Union Circuit Court, in the Fifth Judicial District, in the State of Kentucky, at the Court House, in the City of Morganfield, County of Union and State of Kentucky, and on the dates hereinafter mentioned.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG. DECEASED, - - - - - - - - - *Plaintiff,*

vs.

ILLINOIS CENTERAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY AND F. J. DURBIN, - - - *Defendants.*

PETITION TO REMOVE THIS CASE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BE IT REMEMBERED, That heretofore, to-wit, on the 2nd of November, 1903, came the defendant, The Illinios Centeral Railroad Company, and filed its petition to remove this case to the United *Sates* Circuit Court for the Western District of Kentucky.

Said petition is as follows, to-wit:

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG. DECEASED, - - - - - - - - - *Plaintiff*,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY AND F. J. DURBIN, - - - *Defendants.*

PETITION TO REMOVE THIS CASE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

Your petitioner, Illinois Central Railroad Company states that it is one of the Defendants in the above entitled action, that the matter is dispute therein exclusive of interests and costs, exceeds the sum or value of $2000.00. That such action is of a civil nature, wherein, the Plaintiff R. W. Sheegog, Administrator of the estate of John E. Sheegog deceased, claims the right to recover damages in the sum of $25000.00 for the said John E. Sheegog, deceased, by reason of the derailment of one of your Petitioner's trains upon which the said John E. Sheegog, deceased, was acting as Engineer, through the negligence of your Petitioner's and its Co-defendants, Chicago, St.

Louis & New Orleans Railroad Company, and F. J. Durbin, all of which claims of damage or negligence your petitioner will controvert.

Your Petitioner states that in the above mentioned action there is a controversy which is wholly between citizens of different States, and which can be fully determined between them without the presence in said action of your *of your* Petitioners' Co-Defendants, Chicago, St. Louis & New Orleans Railroad Company, and F. J. Durbin, as parties thereto, or either of them; which said controversy is between your Petitioner, who avers that it was at the time of the commencement of this action, and still is a Corporation created by and organized under and pursuant to the laws of the State of Illinois, and not under or pursuant to the laws of the State of Kentucky, having its principal place of business in the City of Chicago, and in said State of Illinois, and a citizen of the State of Illinois, and not a citizen of the State of Kentucky, and the Plaintiff, R. W. Sheegog, Administrator of the estate of John E. Sheegog, deceased, who was at the time of the commencement of this action and is now a citizen and resident of the State of Kentucky, and both said plaintiff and your petitioner are actually interested in said controversy which is substantially as follows:—

Whether or not your Petitioner as Employer of its Co-Defendant F. J. Durbin, is responsible in damage to the Plaintiff as the Administrator for the death of said John E. Sheegog, resulting from the derailment, of one of your Petitioner's trains on the 7th day of May, 1903.

Your Petitioner further states that it controverts the claim of and negligence of either its Co-Defendants Chicago, St. Louis & New Orleans Railroad Company, or F. J. Durbin, or your Petitioner. Your Petitioner controverts that any negligence contributing to or causing the said accident or death of Plaintiff's decedent, was a joint or concurrent neglegence of your Petitioner, the Chicago, St. Louis & New Orleans Railroad Company, or F. J. Durbin, and your Petitioner charges that the Plaintiff joined the Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin as Co-Defendant with your Petitioner in this action for the purpose and solely for the purpose of preventing a removal of this action to the United States Circuit Court for the Western District of Kentucky. Petitioner, Illinois Central Railroad Company admits that its Co-Defendant, Chicago, St. Louis & New Orleans Railroad Company is empowered to construct and to lease to your Petitioner its Railroad mentioned in Plaintiff's petition, and says that it was so empowered by Act of the General Assembly of the Commonwealth of Kentucky long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which said Act of the General Assembly became a law on the 24th day of February 1882, and is entitled

and that pursuant to such powers the Chicago, St. Louis & New Orleans Railroad Company being the owner leased to your Petitioner all of the Railroad mentioned in the Petition, and parted wth all dominion over it, and that your Petitioner has since said lease continuously operated

said Railroad exclusively, and that said lessor has never at any time operated it, which is, and at the commencement of this action, and at all times was, well know— to the Plaintiff.

Your Petitioner says that Plaintiff's decedent at the time he received the fatal injury complained of, was an employee of your Petitioner, and not an employee of either of your Petitioner's Co-Defendants and was not and never had been an employee or in the employ of said lessor, or said F. J. Durbin, and that all the said facts were well known to Plaintiff when this action was brought. Your Petitioner says that to avoid such removal to Federal Court of this action, Plaintiff joined your Petitioner's Co-Defendants, one a Kentucky Corporation and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was through joint and gross negligence and carelessness of all the Defendants derailed and said decedent instantly killed, and falsely and fraudulently alleged that by the negligence of both of Defendant's road-bed, rails, track, cattle guards, fences, and right-of-way of the said Railroad was allowed to be and for a long time had been in a weak rotten, ruinous, defective and improper condition, and by the negligence of your Petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road premises and cars of the Defendants was known to the

Defendants, and that at the time of the wreck and accident the same were being operated in a careless manner by all of the Defendants, and the Defendant, Durbin, by his negligence in running, ordering, and directing said train contributed to cause said accident, and that the negligence of the Defendant in its maintenance of its track, road-bed, engine, cattle-guards, rails, ties, fences, etc., as set out above, together with the negligence of your Petitioner in directing and permittion its engine, cars and road-bed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions altogether caused said wreck, and killed said decedent, when the Plaintiff well knew that such allegations were untrue, and Plaintiff did not expect to establish such allegations, and did not make them for the purpose of proving them at the trial or of substantiating his cause of action therewith, but made them solely for the purpose of attempting to set up a joint cause of action against the three Defendants in order to make a case which would not be removable to the Federal Court. Your Petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States for the Western District of Kentucky on the first day of its next session, a copy of the record in this case, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto.

And it prays this Court to proceed no further herein except to accept this petition and approve said surety and bond.

H. D. Allen,
Pirtle & Tribue, For Petitioner.

STATE OF KENTUCKY, }
COUNTY OF UNION. } Set.

J. McH. Tichenor says that he is the chief Officer and the Agent of the Illionis Central Railroad Company residing in Union County Kentucky and that he believes the statements contained in the foregoing petition are true.

J. McH. Tichenor.

Subscribed and sworn to before me by J. McH. Tichenor this November 2nd, 1903.

G. B. Allen,
Examiner for Union County, Kentucky.

STATE OF KENTUCKY, }
COUNTY OF UNION. }

Please before the Honorable John L. Dorsey, Judge of the Union Circuit Court, in the Fifth Judicial District, in the State of Kentucky, at the Court House in the City of Morganfield, County of Union and State of Kentucky, and on the date hereinafter mentioned.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, DECEASED, - - - - - - - *Plaintiff,*

vs.

ILLINOIS CENTERAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY AND F. J. DURBIN, - - - *Defendants.*

BOND FOR THE TRANSFER OF THIS CAUSE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

BE IT REMEMBERED, That heretofore, to-wit, on the 2nd day of November, 1903, came the defendants, The Illinois Centeral Railroad Company, and filed its bond for the transfer of this cause to the United States Circuit Court for the Western District of Kentucky.

Said Bond is as follows, to-wit:

IN THE UNION CIRCUIT COURT, UNION COUNTY, STATE OF KENTUCKY.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, DECEASED, - - - - - - - *Plaintiff*,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY AND F. J. DURBIN, - - - *Defendants.*

BOND FOR THE TRANSFER OF THIS CAUSE TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

KNOW ALL MEN BY THESE PRESENTS that we, the Illinois Central Railroad Company as principal and H. D. Allen, as surety, are held and firmly bound unto R. W. Sheegog, Administrator of John E. Sheegog, deceased, and unto all other persons whom it may concern in the penal sum of two hundred and fifty dollars for the payment of which well and truly to be made, we bind ourselves, our heirs, representatives and assigns, jointly and severally firmly by these presents:

YET UPON THESE CONDITIONS:—The said Illinois Central Railroad Company having petitioned the Union Circuit Court of Union County, State of Kentucky, for the removal of a certain cause therein pending

wherein R. W. Sheegog, Administrator of John E. Sheegog, is Plaintiff, and the Illinois Central Railroad Company, Chicago, St. Louis & New Orleans Railroad Company and F. J. Durbin are Defendants, to the Circuit Court of the United States in and for the Western District of Kentucky.

Now if said Illinois Central Railroad Company, your Petitioner, shall enter in the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 2nd day of November, A. D. 1903.

ILLINOIS CENTRAL RAILROAD COMPANY,
By H. D. Allen, Attorney.
H. D. Allen, Surety.

UNION CIRCUIT COURT.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG,

vs. ORDER.

ILLINOIS CENTERAL RAILROAD COMPANY, ETC., *Defendants.*

BE IT REMEMBERED, That heretofore, to-wit: on the 2nd day of November, 1903, the following order and judgment of the court was had upon said petition and bond for removal of cause to United States Court. Said order and judgment of the court is as follows, to-wit:

This day came the defendant Illinois Centeral Railroad company and tendered and offered to file its petition and bond, the surety in which was adjudged by the court as solvent and good for the amount thereof, and moved the court to remove this cause to the United States Circuit Court for the Western District of Kentucky, and the plaintiff objected to the filing of said petition and bond, and the court being advised overruled said objection and ordered said petition and bond to be filed which was done, to which the plaintiff excepted, and the court being advised declined to accept said bond and overruled the motion to approve same and overruled the petition and motion for the removal of this cause to said

United States Circuit Court, but adjudges this cause not so removable and adjudges that this court has jurisdiction of this cause and retains same, to which ruling of the court the said defendant Illinois Centeral Railroad Company objects and excepts and prays an appeal to the Court of Appeals, which is granted.

I, J. E. Lilly, Clerk of the Union Circuit Court, do certify that the foregoing pages contain a full, true and complete transcript of the petition of R. W. Sheegog, Admr., against the Illinois Central Railroad Company, Chicago, St. Louis and New Orleans Railroad Company and F. J. Durbin, also a complete transcript of the petition filed by the defendant Illinois Central Railroad Company in the above styled case, for the removal of this case to the United States Circuit Court for the Western District of Kentucky.

Also a complete copy of the bond filed by defendant Illinois Central Railroad for removal, and of the order and judgment of the Court on said petition and bond.

Witness my hand as clerk aforesaid. This 7th day of December, 1904.

J. E. Lilly,
Clerk Union Circuit Court.

And on May 2, 1905, the following proceedings were had:

R. W. SHEGOG, ADMR.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

This day came the plaintiff, by P. B. Miller and Hendricks & Miller, his attorneys, Came also the defendant, Illinois Central Railroad Company, by Locket & Locket, C. S. Walker and J. D. Atchison, its attorneys. Came again the plaintiff, R. W. Shegog, Admr., by his attorneys and renewed his motion to remand this case to the State Court because the record fails to show that this court has no jurisdiction of this case, and the Court being fully advised thereof, it is ordered that said motion be, and the same is, hereby overruled, to which the plaintiff excepts. Upon motion of the defendant, Illinois Central Railroad Company, by its attorneys, it is ordered that the answer and amended answer of defendant filed in the Union Circuit Court be, and each are, hereby now filed.

On motion of the plaintiff it is ordered that the reply to the answer of the defendant, the I. C. R. R. Co., filed in the Union Circuit Court, be, and the same is, hereby now filed.

Came again the plaintiff by its said attorneys and filed his reply to the amended answer of the defendant, Illinois Central Railroad Company, herein, and, by con-

sent of parties, it is ordered that the affirmative allegations of said replies filed herein be, and the same are, controverted of record.

Thereupon came a jury, to-wit: Sam Campbell, John H. Gray, R. B. Martin, Wilbur Cromwell, Charles Gray, J. W. Barnhill, W. K. Thomas, W. T. Sanders, J. W. Minton, W. K. Jernigan, W. C. Knott and J. Richard Moore, who were elected, tried and duly sworn to well and truly try the issue joined. The evidence of the plaintiff was heard. Thereupon the defendant, the Illinois Central Railroad Company, moved the Court to peremptorily instruct the jury to give a verdict for it, and said motion having been argued by counsel it is ordered that said motion be, and the same is hereby, sustained, to which the plaintiff excepts. Thereupon the Court instructed the jury to find a verdict in favor of the defendant, The Illinois Central Railroad Company, whereupon the jury returned into court the following verdict, to-wit:

"We, the jury, find for the defendant, the Illinois Central Railroad Company. Wilbur Cromwell."

It is therefore considered by the Court that the plaintiff, R. W. Shegog, Admr. etc., take nothing by his petition herein as against the defendant, the Illinois Central Railroad Company, herein, and that the defendant, Illinois Central Railroad Company, recover of the plaintiff its costs herein expended.

The reply to the amended answer above referred to is as follows:

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF KENTUCKY.

R. W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, DECEASED, - - - - - - - *Plaintiff*,

vs. REPLY TO AMENDED ANSWER.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Defendant.*

Plaintiff, for reply to the amended answer of defendant, Illinois Central Railroad Company, says it is true the train and engine on which plaintiff's intestate was riding at the time of the accident which resulted in his death, struck a mule and was derailed, but denies "that the derailment," or "wrecking of said train by reason of which plaintiff's intestate was killed, was caused solely by collision of the train with a mule," or "that said mule, without fault or carelessness upon the part of this defendant" (Illinois Central Railroad Co.) "strayed upon the roadbed," and denies that said collision resulted from the negligence of plaintiff's intestate either in failing to discover the said mule in time to avoid striking it or "in negligently or carelessly failing to avoid collision with it after it was discovered by him," and denies that said intestate was at said time in any way negligent, or that any negligence of said intestate in any way contributed to cause said accident, and plaintiff denies that said

intestate contracted with defendant to assume the risk of such accident, or that he would not claim damages because of same, or that might result to him therefrom.

P. B. Miller
and
Hendrick & Miller,
Attorneys for plaintiff.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF KENTUCKY, OWENSBORO DIVISION.

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division, at Owensboro, do hereby certify that the foregoing 49 pages contain a true and correct transcript of the record and proceedings had in the case of R. W. Sheegog, Admr. v. Illinois Central Railroad Company, etc., No. 152, as the same appears from files and records in my said office.

Witness my hand and seal of said court this 18th day of October, 1909.

A. G. Ronald, Clerk.
By Henry F. Cassin, D. C.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 41.

Office Supreme Court
FILED
NOV 8 19
JAMES H. McKE

ILLINOIS CENTRAL RAILROAD COMPANY, OF THE STATE OF ILLINOIS, - - *Plaintiff in Error,*

vs.

ROBERT W. SHEEGOG, Administrator of JOHN E. SHEEGOG, Deceased, - - *Defendant in Error.*

Brief on Motion to File Transcript of Federal Court Record.

BLEWETT LEE,
EDMUND F. TRABUE,
Council for Plaintiff in Error.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Council.

WESTERFIELD & BONTE, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1909.

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY,
OF THE STATE OF ILLINOIS, - - *Plaintiff in Error,*

vs. BRIEF FOR MOTION TO FILE TRANSCRIPT OF FEDERAL COURT RECORD.

ROBERT W. SHEEGOG, ADMINISTRATOR
OF JOHN F. SHEEGOG, DECEASED, - *Defendant in Error.*

The motion for leave to file transcript of the proceedings in the Federal Court to which this case was removed is predicated upon an interpretation of the decision of this court April 5, 1909, in *Ches. & Ohio R'y Co.* v. *McCabe, Admx., 213 U. S. 207.*

The motion is based upon the ground that where the judgment of the Federal Court which becomes conclusive under the rule announced in the *McCabe case* is entered

after judgment in the State Court there is no way by which the petitioner who is required to defend in the State Court can obtain the benefit of the judgment of the Federal Court unless this Court will permit the proceedings in the Federal Court to be filed here.

By the decision in the *McCabe case* the judgment of the Federal Court is entitled to conclusiveness, and nevertheless if entered too late to be pleaded in the action in the State Court, it may obtain no effect whatever, *e. g.*, where there may be a *supersedeas* as here, and consequently be no threat which would be the basis of injunction.

In legal contemplation there are not two cases, one in the State and the other in the Federal Court, but only one case; so that there ought to be some method by which the record in that case could be considered on any trial of the case under any procedure recognized as lawful. The judgment in the Federal Court was rendered May 2, 1905, and on that day the motion to remand, which seems to have been previously overruled, was renewed and overruled.

If, however, the petitioner is not entitled in this Court on writ of error to the State Court to the benefit of the judgment of the Federal Court as a conclusive bar, under the *McCabe case*, to proceedings in the State Court, it seems certainly entitled to the benefit of the decision of

the Federal Court as a precedent, or authority upon the question of *jurisdiction* and the *merits,* and in as much as the decision is not reported in any Law Publication the motion to file a duly certified transcript of the Federal Court proceedings seems to be the most appropriate method to obtain the benefit of the Federal Court decision as a precedent, or authority.

Respectfully submitted,

BLEWETT LEE,
EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

JOHN C. DOOLAN,
ATTILLA COX, JR.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1909

No._____

ILLINOIS CENTRAL RAILROAD CO.,
PLAINTIFF IN ERROR.

vs.

R. W. SHEEGOG, ADMR. OF JOHN E. SHEEGOG, DECEASED,
DEFENDANT IN ERROR.

Writ of Error to the Court of Appeals of Kentucky.

BRIEF FOR DEFENDANT IN ERROR.

I.

POINTS AND AUTHORITIES.

Case is not removable until the record on its face shows facts which give the Federal Court jurisdiction.

(a) The petition and bond for removal

"constitute the process by which the case is transferred from the State to the Federal Court."

Ex Parte Wisner 203 *U. S.* 449—51 *L. ed* 264.
Kinney vs. Columbia Sav. & Loan Asso., 191 *U. S.* 78-48 *L. ed.*

(b) "If the case be not removed, the jurisdiction of the State Court remains unaffected; and under the Act of Congress the Jurisdiction of the Federal Court could not attach until it becomes the duty of the State Court to proceed no further."

"A State Court is not bound to surrender its jurisdiction of the suit until a case has been made which *on its face* shows that the petitioner has a right to transfer."

"We say upon its face, because the State Court is only at liberty to inquire whether on the face of the record a case has been made which requires it to proceed no further."

Crehore vs. M. & O. Ry. Co., 131 *U. S.* 240—33 *L. ed.* 144.

Stone vs. South Car., 117 *U. S.* 430, 29 *L. ed*, 692.

Carson vs. Hyatt, 118 *U. S.* 279—30 *L. ed*, 167.

Stevens vs. Nichols, 130 *U. S.* 230—32 *L. ed*, 914.

Phoenix Ins. Co., vs. Pechner, 95 *U. S.* 183. 24 *L. ed*, 427.

National Steamship Co., vs. Tugman, 106 *U. S.* 118. *L. ed*, 2787.

B. & O. R. R. Co., vs. Koontz, 104 *U. S.* 514. *L. ed* 26—643.

(c) Controversy must be "wholly between citizens of different states "in order to remove case, and such is not the case when one or more defendants jointly sued are citizens of the same State with plaintiff.

Core vs. Vinal, 117 *U. S.* 347.
Chesapeake vs. Ohio R. R. Co., 179 *U. S.* 131.
Powers vs. C. & O. R. R. Co., 169 *U. S.* 92—42 *L. ed,* 673.
Alabama & G. S. R. R. Co., vs. Thompson, 200 *U. S.* 203—50 *L. ed,* 491.
Cin. N. O. & T. P. R. R. Co., vs. Bohon, Admr, 220 *U. S.* 221—50 *L. ed.* 448.

II.

"If the act of an individual is within the terms of the law, whatever may be the reasons which govern him or whatever may be the result, it can not be impeached."

Doyle vs. Continental Ins. Co. 94 *U. D.* 535—54 *L. ed,* 148.
Prewitt vs. S. Mut. L. Ins. Co., 115 *Ky.* 26 *Ky., L. R.* 1239, 83 *S. W.* 611.

"Plaintiff's motive in the performance of a lawful act was not open to inquiry.

C. & O. R. R. Co., vs. Dixon, 179 *U. S.* 131—45 *L. ed.* 122.

III.

"The construction given to the Statute of the State by the highest tribunal of the State is regarded as part of the Statute and is binding upon the Courts of the United States as a text."

Leffingwell vs. Warren, 67 *U. S.* 599.
Com. Bank vs. Buckingham, 46 *U. S.* 317.
Jackson vs. Lamphire, 28 *U. S.* 280.

"When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national Courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved."

92 *Fed.*, 124.
Clayborne vs. Brooks, 111 *U. S.*, 400.
Detroit vs. Osborne, 135 *U. S.*, 499.
Gilman vs. Sheboygan, 67 *U. S.* 518.
L. & N. R. R. Co., vs. Ky., 183 *U. S.* 508.
Connell vs. Utica E. R. R. Co., 13 *Fed.*, 241.
C. & O. Ry. Co., vs. Dixon, 179 *U. S.* 131, 45 *L. ed.* 121.
Southern Ry. Co., vs. Carson, 194 *U. S.*, 136—48 *L. ed*, 907.
Alabama G. S. R. Co. vs. Thompson, 200 *U. S.* 206—50 *L. ed.*, 491.
Cin. N. O. & T. P. R. R. Co., vs. Bohon, Admr, 220 *U. S.* 221—50 *L. ed*, 448.

IV.

In case of a misjoinder, a plaintiff's motive in joining a party as defendant can be questioned *only* when by legislative act or judicial decision it is the settled law of the State in which the action is brought that the defendant, alleged to be joined as a sham and a fraud, is *not* liable; and no such question can arise where the law of the State by judicial decision or legislative act fixes the liability of such defendant.

Alabama & Great Southern vs. Thompson, Supra.
Cin. N. O. & T. P. R. R. Co., vs. Bohon, Admr, Supra.
Person vs. I. C. R. R. Co., 118 *Fed.* 342.

(b) The action for death is regulated by the Kentucky Constitution and Statute. Constitution of Kentucky, Sec. 241, Kentucky Statute, Sec. 6. And the liability of a railroad corporation that leases its track is regulated by the Kentucky Constitution, Sec. 203, which forbids the shifting of that liability from the lessor to the lessee.

V.

(a) It is the settled law of Kentucky that independent of the constitutional provision the corporation owning the road and having received a charter from the State is under certain public duties that even a duly authorized lease will not shift or change, and the owner can not divest itself of those public duties.

Brooker vs. M. & B. S. R. R. Co., 119 *Ky.,* 137.
McCabe's Admr. vs. M. & B. S. R. R. Co., 112 *Ky.,* 861, 66 *S. W.,* 1054.
Swice's Admr. vs. M. & B. R. R. Co., 116. *Ky.* 253—75 *S. W.* 278.
Howard vs. M. & B. S. R. R. Co., 70 *S. W.* 631.
Davis Admr. vs. C. & O. Ry. Co., 75 *S. W.,* 227
Clinger's Admr. vs. M. & B. R. R. Co., —— *Ky.* 109 *S. W.* 317.

Section 203 of the Constitution of Kentucky says:

> "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

This decision of the highest Court of Kentucky in the case at bar construes this section of the Kentucky Constitution.

(b) While the lessor may not be liable to the servant of the lessee for an injury caused by the negligent act or omission of the lessee as to some duty growing out of the mere relationship of master and servant, the lessor *is liable* for an injury to ANY MEMBER OF THE PUBLIC, INCLUDING THE SERVANT OF THE LESSEE, who may be injured by a negligent act or omission as to a PUBLIC DUTY, such as a failure to keep its roadbed or track, cattle guards, fences, or station houses in a reasonably safe condition. Such is the decision of the highest Court in Kentucky in the case at bar, and it is supported by all the former cases we have cited, and also the case of *Swice's Admr. vs. M. B. & S. R. R. Co.*, 116 *Ky.* 203, and by the cases of *Nugent vs. Boston, etc., Railroad Co.*, 80 *Me*, 62—*6th American State Reports*, 151. *Curl vs Railroad*, 28 *Kan.* 622. *Arrowsmith vs. Railroad*, 57 *Fed.*, 165, *and Lee vs. S. P. R. R. Co.*, 116

Cal. 97—47 *Pac.* 932—38 *L. R. A.* 71—58, *Am St. Rep.*, 152; which last case says:

> "A somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict."
>
> "The sum of all these decisions is, that the Railroad Company's duty to maintain its track, buildings, fences, cattle guards, and to have same all properly located is a public duty —an obligation to every *member of the public,* which it cannot throw off by any kind of lease or contract."
>
> Mr. Justice Brewer in *Railway vs. Curl, Supra.*

VI.

To sue all three of the defendants for damages resulting from the negligent acts charged in the petition of plaintiff, is allowable under the Kentucky practice, and all were jointly bound or liable.

> "While several may be guilty of several and distinct acts, yet if every concurrent effect is to produce an actionable injury, they are all liable therefor. *The action, properly speaking, is not to recover for the negligent act or acts, but it is to recover damages for the injury which they produced.*"
>
> *Pugh vs. C. & O. Ry. Co.*, 101 *Ky.* 77.
>
> *Rutherford vs. I. C. R. R. Co.*, 27 *K. L. R.* 397.
>
> *Jones Admr. vs. I. C. R. R. Co.*, 26 *Ky. L. R.* 31.
>
> *I. C. R. R. Co., vs. Coley*, 28 *Ky. L. R.* 336.
>
> *Cent. Pass. Ry. Co. vs. Kuhn*, 86 *Ky.* 578.

Hawkins vs. Riley, 17 *B. M.* 101.
C. & O. R. R. Co., vs. Dixon, 179 *U. S.* 131.
C. N. O. & T. P. R. Co., vs. Bohon's Admr, Supra.

VII.

The failure to enclose the track at the point in question was a violation of Section 1793 of the Kentucky Statute, and made the Railway Company liable.

McGee, etc., receiver, vs. Guyn, 98 *Ky* 209.
McGee vs. Ghains, 98 *Ky.* 182.
McKee vs. C. N. O. R. R. Co., 19 *Ky. L. R.* 1270.

Same is the settled law of Kentucky by both judicial decisions and Statutory enactment. *Parish vs. L. & N. R. R. Co.*, —— *Ky.* —— 78 *S. W.* 186, 25 *Ky. L. R.* 1524. *Kentucky Statutes, Sec.* 466.

> "A person injured by the violation of any Statute may recover from the offender such damages as he may sustain by such violation, although a penalty or forfeiture for such violation may be thereby imposed."

(Construed in *Parish vs. L. & N. R. R. Co., Supra.*)

See also *City of Henderson vs. Clayton*, 22 *Ky. L. R.* 284. Same rule is followed in this court. *Hays vs. Michigan Cent. R. R. Co.*, 111 *U. S.* 228.—28 *L. ed.* 410.

VIII.

Under the authorities cited hereinbefore, the construction given by the Court of Appeals of Kentucky to Section 119 of the Kentucky Civil Code is conclusive; and no act of the legislature or authority for the lease is set forth in the petition for removal; and that being true, the lease, if such existed, is not shown by any allegation to have been authorized by law and should, therefore, be treated as void.

Thomas vs. West Jersey R. R. Co., 101 *U. S.* 71.

Railroad vs. Winans, 17 *Howard*, 30.

IX.

Petition to remove after a trial on the merits comes too late. A peremptory instruction to find for any of the defendants was "ruling on the merits and not a ruling on the question of jurisdiction." "The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."

Whitcomb vs. Smithson, 175 *U. S.* 635—44 *L. ed.* 303.

Kansas City Suburban Belt Ry. vs. Herman, 187 *U. S.* 63—47 *L. ed.*, 76.

THEREFORE:

Not only does the petition of the Plaintiff allege facts that would constitute a joint cause of action

against all of the defendants, as held by the Court of Appeals of Kentucky, but as stated by the opinion of that Court in this case, "the testimony showed *without much contradiction*" the truth of Plaintiff's allegations as to the miserably defective and dangerous condition of this track and thus absolutely fixed the liability of both the lessee and the lessor for the death of the Plaintiff's intestate which was caused thereby,—and the effort to avoid this conclusion by claiming the striking of the stray mule by the engine was the proximate cause, only makes matters worse for the corporations, because their actionable negligence in violating Sec. 1793 Ky. Statute, as to a cattle guard at that place, caused the collision with the mule. 1793.

SUPREME COURT OF THE UNITED STATES.

ILLINOIS CENTRAL RAILROAD COMPANY,
Plaintiff in Error.

VS.

ROBERT W. SHEEGOG, ADMR., OF JOHN E. SHEEGOG,
Defendant in Error.

Brief for the Defendant in Error.

This case comes from the Court of Appeals of Kentucky. The suit was originally brought in the Union Circuit Court (in Union County, Kentucky,) on October 22, 1903, against the Chicago, St. Louis

and New Orleans Railroad Company, Illinois Central Railroad Company and F. J. Durbin, and Plaintiff alleged as cause of action that John E. Sheegog was killed by the concurrent negligence of the three defendants, the first named defendant, Chicago, St. Louis and New Orleans Railroad Company, being the owner and lessor of the railroad, the second defendant, Illinois Central Railroad Company, the lessee operating the road, and the third defendant, a conductor in charge of one of the trains of the Illinois Central Railroad Company.

The petition is in part in words and figures as follows:

> "At the time the defendant, the Chicago, St. Louis and New Orleans Railroad Company, was the owner of said roadbed, fences, right of way, trestles and bridges where said accident happened and the Illinois Central Railroad Company was the lessee of said railroad property and premises, and was the owner of the engines and cars, trains, and appliances by which the said intestate was killed, and was operating the said road, trains, and engine, and the defendant, F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter railroad company, and in charge of said train and engine and appliances, and the said intestate was required to obey, and was obeying and acting under the orders of the said defendant F. J. Durbin. The plaintiff now says that, by the negligence of both of said companies, defendants hereto, the said roadbed, rails, track, cattle guards, ties, fence,

and right of way of the said railroad was allowed to be, and for a long time had been in a weak, rotten, ruinous, defective and improper condition, and by the negligence of the Illinois Central Railroad Co,. its engines and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road, premises, and cars of the defendants was known to the said defendants, and at the time of this said wreck and accident same were being operated in a careless manner by all of said defendants; and the said Durbin, by his negligence in running, ordering and directing said train, contributed to the cause of said accident; and the plaintiff says that the negligence of the defendant (Chicago, St. Louis and New Orleans Railroad Company) in its maintenance of its tracks, roadbed, engine, cattle guards, rails, ties, fences, etc., as above set out, and together with the negligence of the Illinois Central Railroad Company, in directing and permitting its engine, cars, and road to be operated while in a defective and dangerous condition, and the negligence of the said conductor, in ordering and directing the running and management of said train, and in failing to give proper directions, all together, jointly caused said wreck and killed the plaintiff's said intestate."

And it further alleged

That the defendant was a young, vigorous man, an excellent locomotive engineer, intelligent, sober, industrious, of most excellent habits and prospects, and making and saving large sums of money, and that by the joint gross neg-

ligence of the defendants in thus causing the death, the plaintiff has been damaged in the sum of $25,000.00.

The petition of the plaintiff also showed that at the time of the bringing of the suit the first named defendant, the owner and lessee of the track was a Kentucky corporation, and, so far as a corporation can be a citizen, a citizen of Kentucky, as was also F. J. Durbin, the individual defendant, and that the defendant, Illinois Central Railroad Company, was a corporation of Illinois.

In due time the Illinois Central Railroad Company filed in the Union Circuit Court its petition asking for a removal of the cause to the United States Court. Said petition for removal, after making the usual formal allegations, in the following language said the controversy was:

"Whether or not your petitioner as employer of its co-defendant, F. J. Durbin, is responsible in damages to the plaintiff as administrator for the death of said John E. Sheegog, resulting from the derailment of one of your petitioner's trains on the 7th day of May, 1903.

"Your petitioner further states that it controverts the claim of any negligence of either of its co-defendants, Chicago, St. Louis and New Orleans Railroad Company or F. J. Durbin, or your petitioner controverts that any negligence contributing to or causing the said accident or death of plaintiff's decedent was a joint or concurrent negligence of your petitioner, the Chica-

go, St. Louis and New Orleans Railroad Company, or F. J. Durbin, and your petitioner charges that the plaintiff joined the said Chicago, St. Louis and New Orleans Railroad Company and F. J. Durbin as co-defendants with your petitioner in this action for the purpose and solely for the purpose of preventing a removal of this action to the United States Circuit Court for the Western District of Kentucky, Petitioner, Illinois Central Railroad Company admits that its co-defendant, Chicago, St. Louis and New Orleans Railroad Company is empowered to construct and to lease to your petitioner its railroad mentioned in plaintiff's petition, and says that it was so empowered by act of the General Assembly of the Commonwealth of Kentucky long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which said act of the General Assembly became a law on the 24th day of February, 1882, and is entitled * * *
and that pursuant to such powers the Chicago, St. Louis and New Orleans Railroad Company being the owner leased to your petitioner all of the railroad mentioned in the petition, and parted with all dominion over it, and that your petitioner has since said lease continuously operated said railroad exclusively, and that said lessor has never at any time operated it, which is, and at the commencement of this action, and at all times was well known to plaintiff.

Your petitioner says that plaintiff's decedent at the time he received the fatal injury complained of was an employee of your petitioner and not an employee of either of your petitioner's co-defendants, and was not and never

had been an employee or in the employ of said lessor, or said F. J. Durbin, and that all the said facts were well known to plaintiff when this action was brought. Your petitioner says that to avoid such removal to Federal Court of this action, plaintiff joined your petitioner's co-defendants, one a Kentucky corporation, and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was through joint and gross negligence and carelessness of all the defendants derailed and said decedent instantly killed, and falsely and fraudulently alleged that by the negligence of both of defendants' roadbed, rails, track, cattle guards, fences, and right-of-way of the said railroad was allowed to be and for a long time had been, in a weak, rotten, ruinous, defective and improper condition, and by the negligence of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road premises and cars of the defendants was known to the defendants, and that at the time of the wreck and accident the same were being operated in a careless manner by all the defendants, and the defendant, Durban, by his negligence in running, ordering and directing said train contributed to cause said action, and that the negligence of the defendant in its maintenance of its track, road-bed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with the negligence of your petitioner in directing and

permitting its engine, cars and road-bed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions altogether caused said wreck, and killed said decedent, when the plaintiff well knew that such allegations were untrue, and plaintiff did not expect to establish allegations, and did not make them for the purpose of proving them at the trial or of substantiating his cause of action therewith, but made them solely for the purpose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal Court. Your petitioner offers herewith a bond with good and sufficient surety for its entering in said Circuit Court of the United States for the Western District of Kentucky, on the first day of its next session, a copy of the record in this case, and for paying all costs that may be awarded by said Circuit Court if said Court shall hold that this action was wrongfully or improperly removed thereto. And its prays, etc." (Pages 6 to 8. Transcript of record.)

The Union Circuit Court held that the bond tendered with the petition was good, but acting upon the face of the record, refused to make an order removing the case, holding that the State Court had jurisdiction and the case was not removable, and required all the defendants to answer. The pleadings were accordingly filed and the issues made, and in March, 1905, the trial came

on and resulted in a verdict and judgment in favor of the plaintiff against the Illinois Central Railroad Company for $8,250.00, but in a verdict and judgment against the plaintiff in favor of the other defendants. And appeal was taken by the Illinois Central Railroad Company to the Court of Appeals of Kentucky, and the case was affirmed by the latter Court.

It will be observed that upon the close of the evidence in the Trial Court, the Union Circuit Court, that the Court in giving instructions to the jury, in one and the same instruction, directed a verdict in favor of the Chicago, St. Louis and New Orleans Railroad Company and F. J. Durbin and submitted the issue of fact as to the Illinois Central Railroad Company to the jury.

The trial court evidently considered that the lessor company could not be held liable for an injury to the servant of the lessee. But the Court of Appeals of Kentucky held that, upon the facts alleged and proved upon the trial, the lessor was, under the law of Kentucky jointly bound with the lessee and affirmed the judgment of the lower Court against the Illinois Central Railroad Company because of the existence of those facts, and in so doing held—

> THAT BY ITS CHARTER A RAILROAD COMPANY UNDER THE LAWS OF KENTUCKY OWED THE PUBLIC, INCLUDING THE SERVANTS OF THE LESSEE, THE

DUTY TO CONSTRUCT AND MAINTAIN A REASONABLY SAFE ROAD-BED AND COULD NOT BY A NAKED LEASE RID ITSELF OF THIS DUTY.

While attorneys for the administrator contended that this was the law, yet because of the fact that the Illinois Central Railroad Company was solvent, no cross-appeal was taken by the plaintiff to the Court of Appeals of Kentucky, though this could have been successfully done, as is conclusively shown by the decision of the latter Court, as will be seen by reference to the opinion 103 *S. W.*, 323 31st *Ky. Law Rep.* 691. See also transcript of record, 221 to 231.

The one question involved here is a question of jurisdiction. The plaintiff below and his decedent were both citizens and residents of the State of Kentucky. The killing occurred in the County of Union, and the administrator lived in the County of Muhlenberg. The Union Circuit Court had jurisdiction of the subject of the action.

Ought the case to have been removed upon the filing of the petition of the Illinois Central Railroad Company?

In the case of *Crehore vs. O. & M. Railway Company*, 131 *U. S.*, 240, 33*rd L. ed.*, 144, *this Court*, Justice Harlan delivering the opinion, said:

> "If the case be not removed, the jurisdiction of the State Court remains unaffected; and un-

der the Act of Congress the jurisdiction of the Federal Court could not attach until it becomes the duty of the State Court to proceed no further."

In the same case this Court said:

"A State Court is not bound to surrender its jurisdiction of the suit until a case has been made which *on its face* shows that the petitioner has a right to transfer." And cited—

Stone vs. South Carolina, 117 *U. S.* 430—29 *L. ed.*, 962.
Carson vs. Hyatt, 188 *U. S.* 279. 30 *L. ed.*, 167.

While the emphasis on the words in the foregoing quotation is ours, this Court plainly meant to be understood to say that the record *must on its face* show a cause for removal for the opinion uses this language:

"We say upon its face, because the State Court is only at liberty to inquire whether on the face of the record a case has been made which requires it to proceed no further."

The learned Justice Harlan then went on to explain that while the same question had been before the Court in *Stevens vs. Nichols*, 130 *U. S.*—230 (32:914) the Court's reasons had not been "stated with fulness" but that that was now done "because inadvertent language in some previous decisions "had been misinterpreted, and the Court was trying once for all to make this so clear it could not be misunderstood.

See also:

Phoenix Insurance Company vs. Pechner—95 *U. S.* 183 (24:427.)
National Steamship Co., vs. Tugman—106 *U. S.* 118 (27:87.)
Baltimore & O. R. Co. vs. Koontz—140 *U. S.* 5, 14—(26:643.)

Then if the petition of the Illinois Central Railroad Company for removal, fails to come up to the requirements of this rule, the first assignment of error is not well taken. That petition is insufficient, because, taken with the record it fails to show the controversy is "wholly between citizens of different states."

A case cannot be removed upon the ground of diversity of citizenship, unless the controversy be "wholly between citizens of different states," and such is not the case when the plaintiff in his petition states a joint cause of action against two or more defendants, one of whom is a citizen of the same state with plaintiff and of the state in which the action is instituted.

Core vs. Vinal—117 *U. S.* 347.
Chesapeake & Ohio R. R. Co. vs. Dixon—179 *U. S.* 131.
Powers vs. Chesapeake O. R. R. Co. 169 *U. S.* 92, 42 *L. ed.* 673.
Alabama G. S. R. Co. vs. Thompson, 200 *U. S.* 206, 50 *L. ed.* 441.
Cincinnati N. O. & T. P. R. Co. vs. Bohon Admr. 200 *U. S.* 221. 50 *L. ed.*, 448.

The second assignment of error is a repetition of the first, except that it complains that the state Court held that it might "inquire into the truth of the allegations of the petition for removal," etc., and "especially might try and determine the allegations made by plaintiff in error of fraud in the joinder" of the other two defendants in the Lower Court.

Our answer to that, is that the State Court did not so rule or hold, but on the contrary held that the petition for removal was on its face insufficient. By reference to page 224 of the Transcript of the record, it will be found that the State Court upon this point used this language—

> "The main contention of appellant is that the Court erred in refusing to surrender jurisdiction to the Federal Court. There is no question but that the petition of appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants. Upon the filing of the petition by appellant for removal of the case to the Federal Court, it was the duty of the Judge of the State Court to determine from the petition and record, whether or not there was presented a Federal case, if so it was his duty to proceed no further, but to remove the case to the Federal Court, and it was the duty of that Court to hear the proof on the jurisdictional facts, or questions raised by the petition for removal, and determine whether the Federal Court or State Court had jurisdiction of the case."

It is thus seen that the ruling of the State Court was precisely to the contrary of that imputed to it

by this assignment. It will be seen on the next page of the Transcript—page 225—that the State Court cited the Crehore case, supra, and a long list of other cases and quoted from them copiously to show that the question of removal was to be determined by the *face of the record*, and expressly held that "all issues of fact made upon the petition for removal must be tried in the Circuit Court," "meaning Federal Court."

We call attention here to the fact that the contention of plaintiff in error in its second assignment, is in direct conflict with that in the eighth assignment because in the one, complaint is made that the State Courts inquired into the facts—the merits of the case—upon the question of removal; and in the other complaint is made that the court did not decide that the case "became removable upon the action of the trial or Circuit Court of the State" at the close of the trial upon the merits. But we shall later consider assignment Number 8.

The third assignment is in the following words:

> "The said Court of Appeals of Kentucky erred in holding and deciding that the Chicago St. Louis and New Orleans Railroad Company aforesaid joined as co-defendant with plaintiff in error, as aforesaid, was not joined in said action as a defendant for the fraudulent purpose of preventing a removal of said action to the United States Circuit Court for the Western District of Kentucky, and erred in refusing to hold and decide that it was joined as a co-defend-

ant of plaintiff in error for the fraudulent purpose of preventing a removal of said action to said United States Circuit Court."

The Court of Appeals was called upon to decide not the motive that actuated the plaintiff below in joining the three defendants, but whether or not they were properly joined as defendants, and, as said by this Court in *Chesapeake and Ohio Railroad Company vs. Dixon* 179 *U. S.* 131, "plaintiff's motive in performing a lawful act could not be inquired into." It seems to us that great inconsistency is shown when this assignment complains that the State Court "erred in refusing to hold and decide it" (the lessor Company) "was joined as a co-defendant of plaintiff in error for the fraudulent purpose of preventing a removal of said action," etc. The next preceding assignment contended that the State Court had no right to "inquire into the truth of the allegations of the petition for removal" or to "try and determine the allegations made by plaintiff in error of fraud in the joinder," etc.

In the one assignment of error, contention is made that the Court had no right to determine or pass upon the question of fact, and in the very next assignment, complaint is made that the State Court did not do this very thing.

THE REAL CONTENTION IN THE CASE.

In fact, the real contention of plaintiff in error is that in a case like this, the allegation in the peti-

tion for removal that the joinder of the defendants was fraudulent and made to defeat Federal jurisdiction is of itself sufficient to work a removal—that when the State Court finds this charge in the petition for removal it must at once surrender jurisdiction and proceed no further.

We deny this, and say that where the *Constitution and Statute of the State provide a remedy, or establish a right, the motive of a party in availing himself thereof cannot be impeached, or inquired into.*

Second, we say that the right of removal depends upon the jurisdictional facts specified in the removal Statute.

Third, we say that this suit as brought was authorized and provided for by the Constitution of Kentucky, and the Statute thereof, and that the United States Courts will follow the State Courts in adjudications upon State Statutes.

Fourth, The petition of plaintiff (or declaration) stated a joint and perfect cause of action against all three defendants.

Fifth, Even if the allegation of fraud could work a removal, the petition for removal states no fact showing fraud, but *admits the very fact that would make the cause of action joint.*

Upon our first point just stated, we call attention to the fact that this Court upon this very question of removal has stated that the

"plaintiff's motive in the performance of a lawful act was not open to inquiry."

C. & O. R. Co. vs. Dixon, 179 *U. S.* 131—45 *L. ed.* 122. and following that this further quotation—

"If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached."

Doyle vs. Continental Ins. Co., 94 *U. S.,* 535 —24 *L. ed.,* 148.

Prewitt vs. Sec. Mut. L. Ins. Co., 115 *Ky.*— 26 *Ky. L. R.* 1239—83 *S. W.* 61.

As to the second point, we think the authorities here-in-before cited sustain that. In fact, it is so well understood, citation of authorities would seem unnecessary. As to the third, in which we say that the United States Courts have repeatedly and unreservedly held that they will follow the practice and adjudications of State Courts in construing the statutes of the state. See—

Connell vs Utica U. E. R. Co., 13*th. Fed.* 241.

C. & O. R. Company vs. Dixon, 179 *U. S.* 131, 45 *L. ed.,* 121.

Southern R. Co., vs. Carson, 194 *U. S.* 136, 48 *L. ed.,* 907.

Alabama G. S. R. Co., vs. Thompson, Supra.

Cincinnati N. O. T. P. R. Co. vs. Bohon, Supra.

The precise question which is before the Court in this case was before this Court in the case of *Cin-*

cinnati N. O. & T. P. Company vs. Bohon Admr. etc. 200 *U. S.* 221 (50 *L. ed.*, 448.) The petition for removal made in that case precisely the same charge of a fraudulent joinder of defendants to prevent removal that the petition for removal makes here. Yet, this Court said the State Court did right in refusing to surrender jurisdiction. Those allegations of fraud, made in the petition for removal are not quoted in the opinion in the case just cited—the Bohon case—but the transcript in the record of that case in this Court will show the petition for removal makes this allegation:

> "Your petitioner further says that in this suit said plaintiff has fraudulently and improperly joined, as a co-defendant, with your petitioner, one Fred Milligan, who is a citizen of the State of Kentucky, and your petitioner says that Fred Milligan has been fraudulently and improperly joined in this suit because of the fact that he is a resident of the State of Kentucky and for the sole purpose of defeating the jurisdiction of the United States Court."

The case of *Powers vs. C. & O. R. Co.*, 169*th U. S.* 91 *L. ed.* 42—673 is another authority where the precise question was also decided. The history of the Powers case is very instructive upon that point. Two Kentucky citizens were joined with the Railroad Company as defendants, and the petition for removal strongly alleged that the joinder was improper, wrongful and fraudulent. The case was taken to the United States Circuit Court, but was remanded to the State Court, 65 Fed. 129. After-

w .d, in the State Court, when the case was called for trial, though all the issues had been made up and a year had passed after the filing of the first petition for removal, the plaintiff voluntarily dismissed his action against the two individual defendants, and immediately the Railroad Company filed a second petition for removal alleging the fraudulent joinder and conduct of the plaintiff in the matter, and the case was then removed. Upon a trial of the case in this Court it was contended that the time had passed and that this second petition came too late. This Court in answering this very contention said:

> "The result is, that when this plaintiff discontinued his action as against the individual defendants, the case for the *first time* became such a one as, by the express terms of the Statute, the defendant railway company was entitled to remove. * * * A petition for removal, when presented to the State Court, becomes a part of the record of that Court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that Court, it is not bound or authorized to surrender its jurisdiction, and if it does the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case."

Thus, we see that the Court in the Powers case was confronted with this very question, and it said in meeting the objection named, that the case was

not removable as long as the two individual citizens of Kentucky were defendants; and though it had been alleged in the petition for removal that they were joined with the fraudulent purpose of defeating the jurisdiction of this Court, still this Court said that the case for the *first time*, became removable after the plaintiff discontinued the action against the two Kentucky citizens.

Then in view of its previous decisions and with the allegations of fraud before it in the petition for removal in the Bohon case, this Court met the question in this way:

> "The action for death is regulated by the Kentucky Constitution and Statutes."

And then after quoting the sections of the Kentucky Constitution and Statute on the subject, and discussing same, this Court said:

> "A State has the unquestionable right by its Constitution and laws to regulate actions for negligence."

It may be well enough here to copy the Kentucky Constitution, Section 241, which is as follows:

> "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same."

The Kentucky Statute, Section 6, provides:

> "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

The cause of action as stated against all the defendants is joint. If it were so the Federal Courts might differ from the State Courts as to the joinder or misjoinder of parties defendant, or even if it were so that the Court might decide that there was a misjoinder, still this Court holds in *Alabama G. S. Ry. vs. Thompson*, 200 *U. S.* 206 (50 *L. ed.*, 441.) that if the plaintiff in good faith sought or elected to make his cause of action joint, the case could not be removed even though the defendants were *improperly joined*. That case holds that the rule might be different where the record showed an *improper or wrongful* joinder and the petition for removal *set forth the facts* showing this was fraudulently done to defeat Federal jurisdiction.

The rule is different where the record on its face shows the joinder is proper and rightful under the law—the Constitution and Statute, for instance, of the State; and the case is not removable, and the charge in the petition for removal that the joinder was fraudulent will not make the case removable.

If the allegation of fraud made in the petition for removal in such case could make the case removable, then the Constitution and Statute of the State would be a nullity in this respect, and it would be impossible to find a case of this kind that could not be removed. All that would be necessary would be for one of the defendants to file his petition and say he is a citizen of another State, and that he is honest in saying he does not believe his co-defendant is liable, and that plaintiff is dishonest in saying that co-defendant is liable. This simply leads to absurdity. The co-defendant might not only be liable, but might honestly admit his liability, or fail to deny it, so that a judgment would be rendered against him in the State Court, and still the case would be removable.

But whatever the reason may be, the two cases we have just cited do unquestionably make the distinction we contend for, and they were both heard at the same time. We feel safe therefore, in taking the position that—

upon re.

WHEREUPON THE FACTS STATED IN THE PLAINTIFF'S PETITION, THE LAW OF HIS STATE GIVES HIM A JOINT CAUSE OF ACTION AGAINST TWO DEFENDANTS, AN ALLEGATION IN A PETITION FOR REMOVAL THAT THE REJOINDER WAS FRAUDULENT WILL NOT MAKE THE CASE REMOVABLE.

To say that the allegations of his pleading are false merely makes an issue on the merits of the case.

THE PLAINTIFF'S MOTIVE IN JOINING TWO OR MORE PARTIES CAN BE QUESTIONED *ONLY* WHERE THERE IS AN APPARENT MISJOINDER. EVEN THEN HE HAS THE SAME RIGHT TO HAVE THE "CONTROVERSY" AS TO THE *LAW* OF HIS CASE TRIED BY A JUDGE OF HIS STATE COURT THAT HE HAS TO HAVE THE "CONTROVERSY" AS TO THE *FACTS* TRIED BY A JURY OF HIS STATE COURT.

But where there is a misjoinder and it appears that it was made merely for the purpose of preventing a removal, then the plaintiff's motive may be questioned. This distinction is clearly made and aptly stated by Judge Shiras in *Person vs. Illinois Central Railroad Company*, 118 *Fed.*, 342; and the question was so similar to that under discussion, we quote from it as follows:

> "If the statutes of Iowa in providing for the leasing of a line of railway, had in express terms declared that the lessor Company should *not* be liable for injuries resulting from the negligence of the lessee in operating the leased line, or if *the Supreme Court of the State*, in determining the construction to be placed upon the terms of the Statute authorizing the leasing of the railway lines, had held that the lessor could not be held liable for the negli-

gence of its lessee in the operation of its line, so that it was the *settled law* of the State that the lessor Company could not be lawfully charged with liability for the negligence of the lessee in the operation of the leased railway, then the act of joining in one case the lessor and the lessee as defendants would justify the Court in holding that such joinder was not in good faith, but must have been with the intent of thereby defeating, if possible, the removal existing in behalf of the real defendant to the cause of action declared on by plaintiff. On the other hand, if, under the law of the State, the lessor and lessee are each liable to anyone injured through negligence in the operation of the railway lines, *then*, of course, it could not be held that either of these parties was a nominal or sham defendant to a suit brought against them jointly, based upon the operation of the leased railway line. If, however, the question of liability on the part of the lessor company for the results of the negligence of its lessee in the operation of the line *has not been settled*, either by express legislative declaration, or by the *decision of the Supreme Court of the State, then* it cannot be justly said that a plaintiff who seeks to obtain a judgment against both the lessor and lessee for injuries caused him in the negligent operation of the cars or trains on the leased line, is open to the charge of endeavoring to fraudulently defeat the right of removal by joining a nominal or sham party as a defendant in the suit.

"In consideration of the question arising on the motion to remand in this case, the Court is confined to the inquiry whether it is the set-

tled law of the State of Iowa that the lessor of a line of railway within the State is not liable for the negligence of its lessee in the operation of the leased line of railway? If this question has not been finally determined, either by legislative declaration or judicial decision, but exists and is presented in the case as a question to be solved in the further progress of the suit, in the consideration of the rules of law applicable thereto, then this issue of the liability of the lessor company can not be said to be a sham or fraudulent issue, wrongfully injected into the case, for the sole purpose of defeating the right of removal. It is not claimed on behalf of the railway company that there is to be found in the statute law of the State any declaration expressly providing that a lessor railway company is not liable for the negligence of its lessee in the operation of the leased line, and counsel have not called to the attention of the Court any decision of the Supreme Court of the state wherein it is ruled that such liability does not exist. * * * The question of such liability is one of the issues of law arising upon the facts of this case, which must be determined by the Court in which the suit is heard upon its merits; and, therefore, upon the face of the record there is presented for determination a question of the liability of the Dubuque and Sioux City Company (lessor), a question or controversy between citizens of the same state, a question which is an open one, which the plaintiff has a right to present and which the Court can not say is asserted without foundation and as a mere sham or device instituted solely to defeat the right of removal on behalf of the lessee company.

"Do the facts set forth in plaintiff's petition show that there is involved in the suit a separable controversy between the plaintiff and the Illinois Central Railroad Company, in which the Dubuque and Sioux City Railroad Company has no interest, and which can be wholly determined without affecting the rights of the Dubuque and Sioux City Railroad Company? The ground of liability against the Illinois Central Railroad Company is negligence in furnishing a badly constructed and unsafe car for the use of the employes. The ground for liability charged against the Dubuque and Sioux City Railroad Company is that the Company is the owner of the line of railway between Dubuque and Sioux City; that it committed the management and operation of the line to the Illinois Central Railroad Company, as its lessee; that the lessee was negligent in operating the line, and for the results of such negligence the lessor is responsible. The Dubuque and Sioux City Railroad Company is clearly interested in the issue of negligence in the operation of its leased line by its lessee, and on the trial of the case will be entitled to be heard on the issue. That Company has a vital interest in the question, and as the case stands, it can not be decided that the Illinois Central Railroad Company was guilty of negligence in the particular charge without affecting the interest of the Dubuque and Sioux City Railroad Company; and on the other hand, if it should be decided that the Illinois Central Railroad Company was not guilty of the negligence charged against it, then the case would fail as to the Dubuque and Sioux City Railroad Company for the issue tendered by the plain-

tiff in his petition as against the latter Company, is that the Illinois Central Railroad Company is guilty of negligence, causing the injury complained of, and the Dubuque and Sioux City Railroad Company, as the owner and lessor of the line of railway, is liable for the negligence of its lessee in the operation of the road. In no view that can be taken of the case, can it hold that the Dubuque and Sioux City Railroad Company had no interest in the question of negligence charged against the Illinois Central Railroad Company; and, this being so, then it can not be held that the suit presents a controversy solely between the plaintiff and the Illinois Central Railroad Company, but on the contrary, it appears that the Dubuque and Sioux City Railroad Company has a direct and vital interest in the question or controversy existing between the plaintiff and the Illinois Central Railroad Company, and the case does not, therefore, involve a separate controversy within the meaning of the removal statute; furthermore, as the plaintiff has elected to sue the defendants jointly for the consequence of the alleged negligence, it is not open for either defendant to claim that the suit embraces a separable controversy within the meaning of the removal statute. It follows that the case was not removable to this Court."

In the case of *Leffingwell vs. Warren*, 67 *U. S.* 599, Mr. Justice Swayne said:

"The construction given to the Statute of the State by the highest tribunal of state is regarded as part of the statute, and in binding upon the Courts of the United States as a text.

Leffingwell vs. Warren, 67 *U. S.*, 599—606.
Commercial Bank vs. Buckingham, 46 *U. S.* 317.
Jackson vs. Lamphire, 28 *U. S.*, 280.

"It is for state courts to construe their own statutes; the Supreme Court will not review their decisions except when especially authorized by statute.

Ross vs. Duval, 13 *Pet., U. S.* 45.

"The meaning of a state statute declared by the highest court of a state is conclusive upon the Supreme Court of the United States. *Morley vs. Lake Shore, etc., Ry. Co.*, 146 *U. S.* 162; *Miller vs. Swan*, 150 *U. S.*, 132; *Merchants vs. Penn. R. R. Co.*, 153 *U. S.*, 380; *Fallbrook Irr. Dist. vs. Bradley*, 164 *U. S.*, 112; *First Nat. Bank of Aberdeen vs. Chehalis County*, 166 *U. S.*, 440.

"When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. 92 *Fed. Rep.*, 124-128; 12 *C. C. A.* 566; *Claiborne vs. Brooks*, 111 *U. S.* 400; *Detroit vs. Osborne*, 135 *U. S.*, 499."

In the case of *Gilman vs. Sheboygan*, 67 *U. S.*, 518, it is said:

"Acting upon the principles, recognized in its administration from the earliest period of its history, this Court considers itself bound in cases like this, to follow the settled adjudica-

tions of the high state Court, giving constructions to the constitution and laws of the state."

In the case of *L. & N. R. R. Co., vs. Kentucky*, 183 *U. S.*, 508, it is said:

"It was contended in the Courts below and here that as Section 218 of the Constitution of the State of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the Interstate Commerce Act, it should be assumed that it was the intention of the Constitutional Convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the Federal Courts; and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the Commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside the State.

"Such contention might seem reasonably to have been urged in the State Courts, but as they have seen fit to disregard it, and to put a different construction upon the language employed, this Court must accept the meaning of the state enactments to be that found in them by the state courts."

To the same effect is the case of *Arrowsmith vs. N. & D. R. R. Co.*, 118 *Fed.* 165, in which the question is discussed. Judge Lurton in the Arrowsmith case discussing this identical question of a fraudulent joinder made by a petition for removal far stronger and clearer as to facts alleged to constitute fraud, used this language:

> "Has the Nashville & Decatur Railroad Company incurred any liability to the plaintiff *upon the facts stated in the plaintiff's declaration?* If it is jointly or separably liable, then the motion to remand should be granted. If it is not liable, then the motion must be disallowed."

Nothing can be plainer than that the allegations of the plaintiff's declaration were made the test of liability. The Court held that under the act of the legislature and law of the state, the declaration failed to state a cause of action against the N. & D. R. R. Company.

The court in the Arrowsmith case holds that it is the "*misjoinder* that operates as a legal fraud" when facts are developed showing plaintiff had no cause of action and had purposely made this misjoinder for the sake of defeating federal jurisdiction. Of the same nature was the case of Board of County Comrs. vs. K. P. R. Co., 4 Dill 277, in which Mr. Justice Miller delivered the oft-quoted opinion that the Court must be "astute not to permit" such "devices" to become successful, etc. The face of the pleadings showed a misjoinder of parties against whom a cause of action was not stated.

But coming to our next contention that:

> "The petition of plaintiff stated a joint and perfect cause of action against all three of the defendants,"

we think we may content our selves for the present by quoting from the opinion of the Kentucky Court of Appeals as follows:

> "There is no question but that the petition of Appellee, the administrator of deceased, stated a joint cause of action against all three of the defendants." Transcript page 224.

And, also, again on page 226 of the Transcript we find the opinion of the Court of Appeals of Kentucky saying:

> "As stated, a joint cause of action was alleged in the petition of Appellee against all three defendants."

On page 221 of the Transcript, it will be seen, the Court had spoken of the particularity with which the negligence and concurrent negligence of the defendants had been alleged by the plaintiff. In the petition for a rehearing, counsel for the Railroad Company complained that the opinion of the Court of Appeals stated that it was "conceded" that a joint cause of action was stated against all three of the defendants, and the opinion was re-written, changing the language in this particular only—that the language saying this was "conceeded" was omitted.

We shall not cite at this place any other Kentucky decisions to support the Kentucky Court of Appeals in holding that a joint cause of action was stated against all three of the defendants as the only particulars in which this is denied will be discussed in connection with other points. The fifth point we made under this head is: "That, even if the allegation of fraud could work a removal, the petition for removal states no fact showing fraud, but *admits the very fact that would make the cause of action joint.*" We mean joint as against the two corporations—the lessor and the lessee.

The most careful scrutiny of the petition for removal will fail to discover the allegation of the slightest fact or circumstance to indicate fraud.

The plaintiff's petition alleged that the Chicago, St. Louis and New Orleans Railroad Company was the owner of the road and had leased it to the Illinois Central Railroad Company, and that the defendant Durbin was a Conductor in the employ of the latter Company, and that "by the negligence of both of said Companies, defendants hereto, the said road bed, rails, track, cattle-guards, ties, fence and right-of-way of said railroad," were allowed to be and remain in a weak, rotten, ruinous and unsafe and defective condition etc., and after a careful statement of the unsafe and defective condition of the cars, engines and road bed, track and right of way, the petition alleged that—

"This improper and dangerous condition of the said road, premises and cars of the defendants was known to the said defendants and at the time of this said wreck and accident, same were *being operated* in a careless manner by *all of said defendants.*"

And then alleged with particularity the negligence of each defendant and how the negligence of all together in these particulars combined and caused the wreck and killed plaintiff's intestate, or in other words, alleged facts showing the liability of all the three defendants. And while Plaintiff's petition did this, it did not attempt to allege the terms of the lease.

The petition for removal not only admitted the fact that the C. S. L. & N. O. R. R. Co., was the owner of the road, but admitted that it leased it to the I. C. R. R. Co., and *utterly failed* to state the *terms of the lease*, and failed to file any copy or paper showing what the lease was. The Court will search in vain for such a thing in the record, and will not be able to determine from the record what the terms of the lease were. Not so much as the title of the alleged act of the legislature authorizing or supposed to authorize the lease, is given. This is one of the defects in the petition for removal that is pointed out by the opinion of the Court of Appeals of Kentucky in this case. The civil Code of Kentucky, Sub. 2 of Sec. 119, says:

"In pleading a private Statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

By saying that was sufficient, the Code must mean that less than that was not sufficient, and the Court of Appeals of Kentucky holds in the opinion appealed from that such is the meaning of the Code.

Absolutely all the words in the petition for removal attempting to set forth a lease are these:

"Petitioner, Illinois Central Railroad Company admits that its co-defendant, Chicago, St. Louis & New Orleans Railroad Company is empowered to construct and to lease to your petitioner its Railroad mentioned in plaintiff's petition, and says that it was so empowered by act of the General Assembly of the Commonwealth of Kentucky long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which said act of the General Assembly became a law on the 24th day of February, 1882, and is entitled—

and that pursuant to such powers the Chicago, St. Louis & New Orleans Railroad Company being the owner leased to your petitioner all of the railroad mentioned in the petition, and parted with all dominion over it, and that your petitioner has since said lease continuously operated said Railroad exclusively, and that said lessor has never at any time operated it."

We respectfully submit that that is not even an allegation that any act was passed or enacted for any purpose. The petitioner company says it "admits that its co-defendant is empowered to construct and lease to your petitioner its railroad," etc. Plaintiff's petition had said nothing about the power to lease or any act of the legislature. Petitioner for removal was not called upon to "admit" anything. It devolved upon that petitioner to allege the facts necessary to remove. The petition for removal then goes on to express the *opinion* or *conclusion* that its co-defendant "was so empowered by Act of the General Assembly of the Commonwealth of Kentucky long prior to the adoption of the present Constitution of the Commonwealth of Kentucky, which said Act became a law on the 24th day of February, 1882."

That may be the pleader's opinion, but he does not state any fact from which the *Court* can form an opinion.

The pleading then continues thus:

"and that pursuant to such powers—"

(What powers? we should ask.)

"The Chicago, St. Louis & New Orleans Railroad Company, being the owner," (which we had stated, "leased to your petitioner all of the railroad mentioned," etc

(Which we freely admit,)

"and parted with all dominion over it"—which is again an opinion or conclusion of the pleader, and

the Court would have to see the lease to know whether or not that opinion be correct.

In other words, the only thing alleged as a ground for the charge of fraudulent purpose was the fact that the one defendant was the lessee of the other. It is true the petitioner denies very bitterly that the Chicago, St. Louis and New Orleans Railroad Company, and Durbin, were guilty of negligence, *but also denies its own negligence.* If it was a fraud to charge negligence against the one defendant, it was fraudulent to charge it upon the other.

Suppose it should be held that the owner of the road had the power to lease the road, and by that contract rid itself of all duty to the public, and binding the lessee to maintain the road, give up all dominion over it. If it could make that contract, could it not make a contract *retaining* its control and remaining responsible for the condition of the road? Which contract *did* it make? The first or the second? Can this Court tell from anything in this record? Then, can it be said that the general allegation in the petition for removal that the one Company had leased the road to the other is sufficient to show fraud or work a removal? Is it impossible under the law of Kentucky for a lessor to remain bound and so plainly impossible that it is a fraud to sue the lessor regardless of what the terms of the lease may be? That must be the conclusion of a Court that would hold that this record presents a removable cause.

But for the sake of argument, we might admit that the lease attempts to release the lessor (though we do not so admit) still, as so clearly shown by Judge Shiras, in the quotation from *Person vs. I. C. R. R. Co.*, 118 *Fed.* 342, the joining of the lessor could not be considered fraudulent. The position of the learned judge, which is so reasonable that it is axiomatic might be stated in sort of formula thus:

1. IF THE STATUTE OF THE STATE EXPRESSLY AND PLAINLY PROVIDE, OR IF THE DECISIONS OF THE COURTS OF THE STATE HAVE MADE IT THE SETTLED LAW OF THE STATE, THAT THE LESSOR OF A RAILROAD IN A GIVEN CASE IS *NOT* LIABLE FOR THE NEGLIGENCE CHARGED, THEN THE COURT WOULD BE JUSTIFIABLE IN HOLDING THE JOINDER OF THE LESSOR WITH THE LESSEE TO BE FRAUDULENT.

2. IF THE LAW OF THE STATE MAKE EACH OF TWO SUCH DEFENDANTS LIABLE FOR THE NEGLIGENCE CHARGED, THEN IT COULD NOT BE HELD THAT EITHER WAS A NOMINAL OR SHAM DEFENDANT TO A SUIT BROUGHT AGAINST THEM JOINTLY."

3. IF THE QUESTION OF THE LESSOR'S LIABILITY FOR THE NEGLIGENT OPERATION OF THE LINE HAS NOT BEEN SETTLED BY EXPRESS LEGISLA-

TION, OR "*BY THE DECISION OF THE* SUPREME COURT OF THE STATE, THEN IT CANNOT BE JUSTLY SAID THAT A PLAINTIFF WHO SEEKS TO OBTAIN A JUDGMENT AGAINST BOTH LESSOR AND LESSEE FOR INJURIES CAUSED TO HIM IN THE NEGLIGENT OPERATION," OF THE LEASED LINE, IS OPEN TO THE CHARGE OF FRAUD FOR JOINING A SHAM DEFENDANT.

These three propositions of Judge Shiras are so evidently sound, that, as said, they are axiomatic; and they are in perfect harmony with *C. & O. R. R. Co., vs. Dixon, Supra.*, when it says "plaintiff's motive in the performance of a lawful act was not open to inquiry," and when it further said in the language of Chief Justice Fuller:

> "If the liability of defendants, *as set forth in that pleading,* "(plaintiff's petition) "was joint and the cause of action entire, then the controversy was not separable as matter of law, and *Plaintiff's purpose* in *joining Chalky and Sidles was immaterial:*"

And also with the language of this Court in other cases, saying:

> "If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached."

Doyle vs. Con. Ins. Co., 94 *U. S.* 535, 24 *L ed.* 148.

Prewit vs. S. Mut. L. Ins. 115, *Ky.*

and is precisely the law as laid down in *A. G. S. R. vs. Thompson, Supra.*, and *C. N. O. & T. P. R. Co. vs. Bohon, Admr., Supra.*

Applying this test, do we find the State Courts were right or wrong in refusing to surrender jurisdiction? When the petition and bond for removal were presented, the State Court had nothing before it, and under the rule laid down in *Crehore vs. O. & M. R. R. Co., supra., Stone vs. South Carolina, Supra*, and other cases, that Court had no right to consider anything but the "face of the record;" and as said *Ex Parte Wisner*, 203 *U. S.* 449—51 *L. ed.*, 264, and in *Kinney vs. Columbia Sav. & Loan. Asso.*, 191 *U. S.*, 78—48 *L. ed.*, the petition and bond for removal "constitute the process by which the case is transferred from the state to the Federal Court." It becomes, therefore, perfectly plain that the case was not removable. It will not be contended that any statutory provision existed in Kentucky, providing that the lessor should *not* be liable for the negligent maintenance or operation of the leased line. On the contrary Section 203 of the Constitution of Kentucky, hereinafter quoted, expressly provides that the lessor shall not be released from such liability.

Looking then to the decision of the highest Court of the State, we find that the settled law of the state is that the lessor remains bound.

Brooker vs. M. & B. S. R. R. Co., 119 *Ky.*, 137.
McCabe's Admr. vs. M. & B. S. R. R. Co., 112 *Ky.* 861, 66 *S. W.* 1054.
Swice's Admr. vs. M. & B. R. R. Co., 116 *Ky.*, 253—75 *S. W.*, 278.
Howard vs. M. & B. S. R. R. Co., 70 *S. W.*, 631.
Davis Admr. vs. C. & Ry. Co., 75 *S. W.*, 277.
Clinger's Admr. vs. M. & B. R. R. Co., — *Ky.*, 109 *S. W.*, 317.

These decisions of the highest Court in Kentucky make it plain that it is the settled law of that State, that the lessor can not by a lease divest himself of his duty to the public and set up in his stead, some other party solvent or insolvent; but having and retaining the right to condemn land and other great privileges, he must remain subject to the same duties he assumed when he asked and accepted these privileges. He can not hold the franchise and rid himself of the duty it laid upon him.

We shall not quote at length from these Kentucky authorities because the Kentucky Court of Appeals quoted at length from some of them in its opinion. See pages 226, 227, 228, 229 and 230 of the transcript.

In fact, there is no Kentucky authority to the contrary. Our attention has been called to the case of Harper vs. N. N. & M. V. Co., 90 Ky., 359. Investigation will clearly show that this case of Harper vs. N. N. & M. V. Co., is not in conflict, necessarily, with the numerous later cases, just cited. In the first place, it was decided in 1890, prior to the adoption of

the present constitution forbidding the owner to lease the road or forbidding the legislature to empower the owner to lease, in such way as to divest himself of the liability for negligence; and what the act of the legislature authorizing the lease provided, or what the lease provided, or whether or not these were all set forth in the plaintiff's petition in that case, we do not know; but we are certainly warranted in concluding that these things did appear from the plaintiff's petition because the opinion says that petition showed that the road "was owned by the Chesapeake, Ohio, & Southwestern R. R. Co., but was then controlled and operated *exclusively* by the Newport, News & Mississippi Valley Company;" and a general demurrer was sustained because the "Newport News & Mississippi Valley Company, having the *exclusive* control and management of the road, and the locomotive by which the injury was done being at the time operated by its employees, is alone answerable in damages to the Plaintiff."

Thus, we can see clearly that the plaintiff's own petition showed that the *exclusive* control and management was with the lessor. Therefore, we are warranted in concluding that that petition referred to the lease and act of the legislature authorizing it in such way as to make the petition bad on demurrer. The present Constitution of Kentucky was not framed and signed until September, 1891, and did not become effective until later still. So an act authorizing "exclusive control" by the N. N. & M. V.

Co., and releasing the lessor would not have been unconstitutional.

In the next place, the opinion says that under the allegations of the petition, the N. N. & M. V. Co. was "alone answerable in damages of Plaintiff." Whether or not the Plaintiff was an employee of the lessee does not appear, and there was absolutely no discussion of the question in the opinion, which is very meagre on this point, but does show that the injury to Harper was caused, not by any defect in the track or real estate of the owner but "by a locomotive engine running over him through negligence of those in charge of it,"—the locomotive. Therefore, the Court of Appeals of Kentucky in Clinger's Admr'x vs. C. & O. Ry. Co., 109 S. W., 317, decided in April 1908, in discussing this question, said of this case:

> "The Harper case was decided in September 1890, and it appears that the employees of the Newport News & M. V. Co., (a lessee) caused the injury to Harper; but it does not appear whether Harper was an employee of that Company or a third party. The presumption is that he was an employee. If otherwise, the opinion would be against the *trend of all the authorities.*"

It is certainly needless to say more about the Harper case.

In the case of Swice's Admx. vs. M. & B. S. R. R. Co., 116 Ky., 253, which we have cited in support of

our position, it is held that a lessor is not liable to a servant of the lessee for the negligence of the latter in operation of its trains, making a distinction between that and negligence in maintaining the road bed, depots, way lands, etc. The negligence complained of in the case at bar relates to the latter class or kind. The Court of Appeals of Kentucky in the opinion in Clinger's Admrx. vs. C. & O. Ry. Co., supra, also disposed of the contention sometimes made that Sinkhorn vs. Lexington, H. & P. T. Co., 112 Ky., 205, established a contrary doctrine saying:

> "The Sinkhorn case was one wherein Sinkhorn received his injuries by reason of a defective bridge on a turnpike road, after the county had become the owner of it under legislative authority, after a vote by the people of the county. When Sinkhorn was injured the turnpike company did not own the road or the franchise. The county owned both."

Is it possible to make anything plainer than that the highest Court of Kentucky has by repeated decisions made it the settled law of Kentucky that lessor and lessee of a railroad are jointly liable for a failure to perform a public duty which the law laid upon the lessor as owner of the road when it received its charter? We could not write a better argument to show that to be the settled law of the State than is found in the opinion of Clinger's Admrx. vs. C. & O. Ry. Co., supra. The point and purpose of that opinion is to show that the law of

the State was so settled; and that opinion cites a multitude of authorities showing such to be the law of the States of the Union generally.

In addition to all that, Sec. 203 of the Constitution of Kentucky is in the following words:

> "No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

The construction placed upon this by the highest Court of Kentucky, becomes under the decisions of this Court, hereinbefore cited; the law by which this Court will be guided.

This question, we think is really decided for us in the case of C. & O. Ry. Co., vs. McCabe at the last term of this Court on April 5, 1909. The sole ground for removal was the alleged fraudulent joinder of the lessor company, and this Court held that:

> "Even if that Court "(United States Circuit Court)" erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error, or appeal to this Court."

It seemed to us that the opinion in the McCabe case taken as a whole implied clearly that the Federal

Circuit Court erred in assuming jurisdiction, but that the decision though erroneous was not void. If this Court had considered the case removable, the question that was decided could not have arisen.

There remains yet one single particular in which it may be contended (though we do not know that it will be) that the case at bar differs from the other and numerous cases in which the lessor company was held by the Courts of Kentucky and other Courts to be liable. It is this: The intestate of the defendant in error was a servant of the lessee. It is true, distinction has been made in some cases between the case of a servant of the lessee and that of a person who is not a servant of the lessee where it is sought to hold the lessor bound; but as said by the Court of Appeals of Kentucky (See transcript, page 229) the Courts have only extended this distinction to cases in which the lessee's servant was injured by the—

> "negligent operation and handling of its trains and the general management of the leased property; but hold the lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station house, etc."

So we find that the law of Kentucky is in favor of defendant in error in this particular. If it were unsettled and uncertain, as said by Judge Shiras in Person vs. Illinois Central R. R. Co., Supra, whether or not the law of the State make the lessor liable,

> "If this question has not been finally determined, either by legislative declaration or *judicial decision*, but exists and is presented in the case as a question to be solved in the further progress of the suit, in consideration of the rules of law applicable thereto, then this issue of liability of the lessor company can not be said to be a sham or fraudulent issue, wrongfully injected into the case, for the sole purpose of lefeating the right of removal."

Be it remembered that the case in which the learned Judge was so speaking was a case in which the suit was brought by the administrator of a servant of the Illinois Central Railroad Company, against that company which was the lessee, and the Dubuque & Sioux City R. R. Co., the lessor, for the alleged negligent killing of said Person; and it will also be noted that the negligence did not consist in a defective roadbed, or depot building or track, but in the negligence of the lessee company and its foreman as to its cars, etc., making thus the Plaintiff's right to recover come within the exception made in some cases to excuse the lessor. Still, it was held that as neither the legislature nor Courts of Iowa had settled the law for that State, that "the question of liability is one of the issues of law arising upon the facts of this case, which must be determined by the Court in which the suit is heard upon its merits," and that "the question is an open one, which the plaintiff has a right to present and which the Court can not say is without foundation;" and held also that the lessor company had a "vital in-

terest in that question," and as the "Plaintiff had elected to sue the defendants jointly for the consequences of the alleged negligence, it is not open to either defendant to claim that the suit embraces a separable controversy within the meaning of the removal statute," and quoted Powers vs. Railway Co., and Railway Company vs. Dixon, both of which have been cited herein.

Let us now briefly call attention to some cases to show that the decision of the highest Court of Kentucky had held the lessor to be liable to the servant of the lessee for negligence in the performance of a public duty.

The case of McCabe Admrx. vs. M. & B. S. Ry., 112 Ky., 861, says:

> "Thus the lessor is held responsible where cattle stray upon the track and are injured while the road is operated by the lessee, by reason of the failure to fence the track as required by the Statute, or where a person is injured by reason of the improper construction of a station house too near the track, or an injury results from a failure to put sufficient cattle guards, or there is a failure to transport persons or property as required by the charter of the lessor. Hereon vs. Railway Co., 68 Minn., 542, 71 N. W., 706; Lee vs. Railroad Co., 116 Cal., 97, 47 Pac., 932, 38 L. R. A. 71, 58 Am. St. Rep., 140; Bean vs. Railroad Co., 63 Me., 295; Nugent vs. Railroad Co., 80 Me., 62, 12 Atl., 797, 6 Am. St. Rep., 151;; Lakin vs. Railroad Co., 13 Or. 436, 11 Pac., 68, 57 Am. St. Rep., 25."

The Court of Appeals of Kentucky then cited and approved the case of Lee vs. Railroad, 116 California, 47 Pac. 932, 38 L. R. A., 71, 58 Am. St. Rep., 152, which was the case of a servant of the lessee who sued the lessor, and in which a jury returned a verdict in his favor for $8,000, but in which the Court, notwithstanding the verdict, rendered a judgment in favor of the defendant on the very ground contended for by Plaintiff in error, to-wit.: that the lessor could not be held liable to the servant of the lessee. But the Supreme Court of California reversed the Lower Court's decision, using language that will be hereinafter quoted.

The case of Swice's Admr. vs. M. B. & S. R. R. Co., 116 Ky., 203, held that the servant of the lessee could not recover of the lessor damages for the negligence of the lessee in using defective machinery or appliances belonging to and under the exclusive control of the lessee, but used and approved the following language:

> "It may be that if the injury occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable."

After using this language, what kind of position would the Court of Appeals of Kentucky have been in if it had held in the very next case that was before it, presenting this question, that the Plaintiff had committed a fraud in joining as de-

fendant a lessor whose roadbed or track was by it negligently allowed to be defective? After the Court has said the lessor in such case *might be liable*, how can it be held that it was fraud to *ask the Court to hold just such a lessor* liable? It would be hard to find a stronger illustration of the absurdity of the claim that the joining of the lessor in this case was fraudulent.

So when this question was brought before that Court, it not only held that it was not fraudulent to join the lessor as defendant, but held that the lessor was jointly bound upon the allegation of the petitian of Plaintiff, and furthermore held not only that the proof sustained the allegations of that petition, but quoted numerous decisions of the Courts of other States and of Federal Courts to sustain its position and show that the weight of authority was with it, some of these decisions being—

Lee vs. Sou. Pac. R. R. Co., 116 *Cal.* 97; 47 *Pac.* 932, 38 *L. R. A.* 71; 58 *Am. St. R.* 152;
Nugent vs. Boston, C. & W. R., 80 *Me.*, 62. 6 *Am. St. Rep.*, 151;
Arrowsmith vs. Railroad, 57 *Fed.*, 165;
Carl vs. Railroad, 28 *Kansas*, 622;

The case of Nugent vs. Boston C. & W. R. R. Co., supra, is a very carefully considered case and is especially interesting, not only because of the question of the lessor's liability, but because of the numerous cases it cites on the question of the *joint* liability of the two companies.

It was the case of a brakeman in the service of the lessee company, and who was knocked from his train as it passed a station house or depot, too near the track.

But the case of Lee vs. S. P. R. R. Co., supra, being a later case, we cannot better state our position and that of the highest Court of Kentucky than by quoting a part of the opinion of the highest California Court. In that case the Court said:

> "In Nugent vs. Boston, C. & M. R. Co., 80 Me., 62, the defendant railroad, *under express authority of law*, had leased its road to the Portland & Ogdensburg Railroad, which latter road was engaged in its management and operation. A brakeman of the Portland & Ogdensburg road sued defendant for personal injuries received by reason of the negligent construction of an awning at a station house built by the defendant company. The case received elaborate consideration. The action of the brakeman against the owning road was sustained, and the rule deduced in the following language: 'Herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words, an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased road, over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station house, etc., the charter company cannot, in the absence

of statutory exemption, discharge itself of legal responsibility.' In Arrowsmith vs. Nashville & D. R. Co., 57 Fed., Rep. 165, the same rule is enunciated, and numerous authorities cited in support thereof. Indeed, *a somewhat extended examination of the cases justifies the conclusion that this principle, at least, is accepted without conflict.* An analysis of the case of East Line & R. R. Co., vs. Culberson, 72 Texas 375, 3rd L. R. A., 567, a case upon which respondent strongly relies, will disclose that the law there enunciated is not only not at variance with the principle above mentioned, but embodies a distinct recognition of it. In that case, an employe of the operating company sued the lessor company, claiming damages for injuries sustained by reason of defective appliances furnished by the operating company. The Court held, and very properly, that such an action would not lie against the lessor company, and said, 'It may be that if the injury had occurred by reason of a defect in the road bed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employees by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable, merely because it owned the road.' Thus in those cases where the injury has resulted to an employe of the operating company by reason of the negligence of a fellow-servant, or want of skill and care of the lessor company in manag-

ing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. *But where injury has resulted to an employe of the operating company by reason of a failure of the lessor to perform its public duty, as in its failure to construct a safe road, as is here charged, the injured employe may sue the lessor company as one of the public, for its failure to perform that duty and not because between himself and the lessor company the relation of employe and employer, or any relation of contractual privity exists.* As said in Nugent vs. Boston & M. R. R. R., 80 Me. 62, where the brakeman of a lessee road was injured by reason of the defective construction of the station house by the charter company, our opinion therefore is that the Plaintiff had the lawful right, as brakeman on the train of the P. & O., to pass and re-pass by the Bethleham station house of the defendant which, therefore, owed a duty to him to construct and maintain its station house there in such a reasonably safe manner that its awning would not injure him while in the performance of his duty with due care, and that a negligent breach of that duty by the defendant having resulted in a personal injury to the Plaintiff without fault on his part, he is entitled to maintain this action therefor.' So here the charge against the defendant is that the injury resulted by reason of its imperfect construction and maintenance of the rails and track of its road."

It will be noticed that heretofore the lease under consideration has been treated as if authorized by

law, and that the lease in the Lee case and also that in the Nugent case were treated as authorized by law, and that those cases, the Culberson case, and in fact all the cases we have cited on the subject, have held or announced the distinction we have made in favor of the lessee's servant, *even where the lease is authorized by law;* but we think, in reality, in view of the section of the Constitution of Kentucky hereinbefore quoted, and in view of the fact that no act of the legislature has been pleaded, according to the rules of the Kentucky law, appearing in the record, that the lease should be absolutely held as void, and certainly a lease in so far as it attempts to hold the lessor harmless and free from liability for violation of these public duties ought to be treated as void. Thomas vs. West Jersey R. R. Co., 101 U. S., 71; Railroad vs. Winans, 17th Howard 30.

While we might quote cases almost without end, we shall simply here give the language of Mr. Justice Brewer, in Railway Company vs. Curl, 28 Kansas, 622, as follows:

> "The sum of all these decisions is that the Railroad Company's duty to maintain its track, buildings, fences, cattle guards, and to have same all properly located is a public duty—an obligation to *every member of the public*, which it can not throw off by any kind of lease or contract."

In passing, we may say there is nothing in the pleading or in this record to show that the lease to the I. C. R. R. Co., even attempted to relieve lessor of this duty. Who are the public? Was not John E.

Sheegog a member of the public? The duty that the Chicago, St. Louis & New Orleans Railroad Company owed to him was not a duty as between master and servant, but it was a duty which it, under its charter, owed every member of the public. We cannot agree with the reasoning that because the lessor owed the servant a duty under its contract, that therefore it and the lessor could not be sued in the same action. They both owed the public the same duty; and that was to maintain that track and premises in a reasonably safe condition. And both owed to the public, including servants, the duty to conduct their business in a reasonably careful manner. This is the very point that has been decided by the highest Court of Kentucky many times within the last few years. In the great majority of the cases where the railroad company and its agent are sued jointly, there may be liability growing out of the different duties, or different relationships may exist, and still both owe the same duty of reasonable diligence and care. For instance, in the case of Pugh vs. C. & O. R. R. Co., 101 Ky., 77, Pugh, a servant of the defendant company, had sued that company and certain other employees for injury; and the Court of Appeals of Kentucky held that:

> "While several may be guilty of several and distinct acts, yet if every concurrent effect is to produce an actionable injury, they are all liable therefore. *The action, properly speaking, is not to recover for the negligent act or acts, but it is to recover damages for the injury which they produced.*"

In the case just cited, the relationship of master and servant existed between the plaintiff and the defendant railway company, but no such relationship existed between the employes, Brown, Conway and Thornton, the conductor, engineer and fireman of the train. Still the Court held they were jointly liable. This was precisely true also in the case of Grand Trunk Railway Company vs. Cummings, 160 U. S., 702. L. ed, 27, 266. This Court said:

> "If the negligence of the company contributed to, it must have been an immediate cause of the accident, and it is no defnse that another was likewise guilty of the wrong."

In the case of Bohon's Admr., supra, decided by this Court, and hereinbefore referred to, the Plaintiff was in the employ of the defendant company and sued that company and certain other employes, and both the highest Court in Kentucky and this Court held that under the Kentucky practice and the Constitution and Statute of that State, that both the employer and the other servants—co-employes—were liable and could be sued jointly. Again it was the case that the relationship of master and servant existed between the Plaintiff and one of the defendants, but not between him and other of the defendants. Really, the principle was thoroughly discussed by this court in C. & O. R. R. Co. vs. Dixon, supra. The same principle was maintained in Kentucky in the case of Rutherford vs. I. C. R. R. Co., 27 Ky. Law Rep., 397; Jones Admr. vs. I. C. R. R. Co. 26 Ky. Law Rep., 31; I. C. R. R. Co. vs. Coley, 28 Ky.

Law Rep., 336; Cent. Passenger Railway Co. vs. Kuhn, 86 Ky., 578; Hawkins vs. Riley, 17 B. M. 101, and in cases almost without number that could be cited.

In the Rutherford case, just cited above, the action was that of passenger agents against a railway company and some of the employes. The relationship of carrier and passenger existed between Plaintiff and some of the defendants, but not others. Jones Admr. vs. I. C. R. R. Co., was the case of the killing of a servant, and the action was maintained against both the master and other servants, and the Coley case was a case where a third party was struck who was not in the employ of the railway company, and the case of Cent. Passenger Company vs. Kuhn was a case in which the plaintiff, Kuhn, was a passenger upon a street car which was struck by a train of the L. & N. Railroad Company. The street car company and the railway company were both sued jointly, and the joining was held to be proper; and under the Kentucky law the servants in charge of the street railway and the servants in charge of the L. & N. Railway Company could also have been joined as defendants, and as judgment was rendered against both these companies in the same action, judgment could have also been rendered against the guilty servants of both under the Kentucky law; yet as between the plaintiff and the street railway company, there existed the relationship of carrier and passenger. No such relationship existed between him

and the railroad company whose train struck the car which he was riding.

The case of Hawkins vs. Riley, etc., 17 B. M. 101, was a case in which the owner of a stage coach and a driver thereof were held jointly liable for an injured plaintiff.

In these cases the defendants were all held liable because each contributed by his negligence to cause the accident and altogether helped to produce the injury for which the judgment was rendered. So under the settled law of Kentucky there was no trouble in joining both the railroad companies. In fact, it has been held that a lessee, especially in cases of an unauthorized lease, is the agent of the lessor. Certainly in this case it was the duty of both the lessee and the lessor to keep the track in a reasonably safe condition. They both failed. They are both liable for the damages resulting from that failure.

NOT ONLY DOES THE PETITION CHARGE THAT BOTH THE LESSOR AND THE LESSEE WERE GUILTY OF ALLOWING THE TRACK TO BECOME UNSAFE, BUT THE FACTS ACTUALLY PROVED ESTABLISHED THE NEGLIGENCE.

The highest Court of Kentucky in discussing what the proof showed, held that the accident was the result of a defective track. It will be seen that the opinion of the Court of Appeals of Kentucky, beginning on page 223 of the record, says:

"The testimony showed, *without much contradiction* that the portion of the track described had never been ballasted, that the ties were laid on dirt, that much of it had been washed away so that it did not come to the top of the ties, that a track is properly ballasted when crushed stone, gravel or cinders are tamped under, upon and between the ties, and up to a point about even with the top of the rails, (and such was the condition of the track at each end of this cul-de-sac) and that this track as constructed left about fourteen or sixteen inches from this stub pilot to the dirt between the ties, which made the chances of clearing the track of stock when struck by the pilot doubtful.

It was proven by some of the section hands on the road, that this part of the track had been in that condition for a long time, and the general superintendent of the road had had his attention called to it, and had been requested to furnish material to put that part of the road in a reasonably safe condition; but had failed to do so up to the time of the accident. They also stated that the track as laid would often get out of alignment, and that they were compelled by the use of jackscrews, to force it back. Many witnesses testified that they yhad been at this point when trains passed and saw that the track was insecure, that engines and cars would wabble in passing over it, would sink in some places and rise in others, would mash some times down and water and mud would gush up over them, and when trains had passed the rails would straighten and raise some of the ties two inches from the earth. Many witnesses examined the conditions there after the wreck, and about all of them testified that there were many rotten

> ties, some of them stated that more than one-half were rotten, that some of them had rotted into two pieces and so rotten that they could pull the spikes from them with their fingers."

This is not the language of the plaintiff's pleading nor the summoning up of his attorney, but is the judgment of the highest Court of the State as to *what the proof actually showed.* That Court held not only that the proof sustained the allegations of the plaintiff's pleading and warranted the jury's verdict, but held that the condition of the track warranted punitive damages—*showed gross negligence.* See page 224 of the Transcript.

Still, notwithstanding the highest Court of the State held THAT THE PLAINTIFF'S PETITION STATED A JOINT CAUSE OF ACTION AGAINST BOTH DEFENDANTS, AND THAT THE PROOF SUSTAINED THOSE ALLEGATIONS, PLAINTIFF IN ERROR ASKS THIS COURT TO HOLD THE CASE WAS REMOVABLE ON THE GROUND THAT ONE OF THOSE DEFENDANTS WAS A SHAM DEFENDANT FRAUDULENTLY JOINED TO PREVENT REMOVAL.

It would hardly seem necessary in view of the authorities hereinbefore cited to discuss the other assignments of error, and we shall do so, but briefly.

We do not think the fourth assignment well taken, because it is merely a denial of the allegation of plaintiff's cause of action to say that the defective

condition of the track was not the proximate cause of the derailment that caused the death of plaintiff's intestate. That then became an issue to be tried on its merits. A scrutiny of the pleadings will show that the answers of the defendants *did not deny the track was actually defective* but did deny they were negligently allowed to be and remain defective, and denied that the condition of the track or right of way wa the cause of the wreck which killed the intestate, neegog. Then in a separate paragraph each of the swers pleaded affirmatively that the wreck and killing were caused by a collision with a mule. This was unnecessary, because if A, by his pleading charges that B negligently or wrongfully injured him, B is required to do no more than deny the allegation, and it is unnecessary and irrevelant and is surplusage for him to charge that C's negligence or wrongful act caused the injury. But plaintiff's motion to strike and his demurrer to this separate paragraph having been overruled, he replied, controverting the allegation and saying, what was really set forth sufficiently in the petition; that while the engine struck the mule, that accident—the striking of the mule—was not the cause of the wreck, but the track was in such condition as to make this collisio nthe more dangerous—that if the track had been in proper condition, the collision with the mule would not have caused the wreck; and went further and said it was the negligence of the defendants—the lessor and the lessee—that caused the mule to be upon the track, and that the failure to maintain the fence and cattle guard to protect the track, but leav-

ing that particular place, a cul-de-sac and a place where cattle were known to congregate, unfenced, and the track defective, with the negligence of the conductor who knew of these things, altogether caused the killing of the engineer who was ignorant of the condition of the premises. (The engineer, as the proof showed, had been but recently sent to that division of the road.)

It will be seen that plaintiff's petition charged negligence as to "said road bed, rails, track, cattle guards, ties, fences and right-of-way," and that this "improper and dangerous condition of the *said road, premises* and cars of the defendants" were known to all the defendants; and plaintiff's reply to the answer of the defendants as to the striking of the mule was as follows:

> Plaintiff for reply to defendant's answer herein, says it is true that the train upon which his intestate was working and by wrecking of which he was killed, did strike a mule, and was thus thrown from the track, but he says that this was not without fault of carelessness upon the part of the defendants; he says that it was by the negligence of the defendants in failing to maintain their fence on the side of the track, and their cattle-guard at the termination of these fences at the public road, that the said mule got upon the track. He says that there are fences along the line of the right-of-way up to a public road, which crosses the track near the place where the mule was struck, and that at said public road, and at the termination of the said fences the defendants negligently failed to main-

tain a cattle-guard, and that the said animal went upon the track at that place, went down upon the track between said fences to the point where collision occurred; and he denies that the collision resulted from the negligence of plaintiff's intestate in failing to discover the said mule in time to avoid striking it, or in negligently failing to avoid collision with it after it was discovered by him; and denies that said negligence existed, or that it caused the said wreck, but says that because of the negligence of the Illinois Central Railroad Company, defendant herein, in the construction of its engine and defendant's negligence in failing to keep said track in proper condition, the said collision with the mule wrecked the train, and that all these things together with the negligence of all three of the defendants as alleged in the petition of plaintiff herein caused the said wreck, and the death of plaintiff's intestate, and but for the negligence of the defendants as alleged in the petition herein, all acting together, the said wreck would not have occurred."

Defendants rejoined to this and did *not* deny that there were "fences along the line of the right-of-way up to a public road" which crossed the track there, and did not deny the absence of a "cattle-guard" at the "termination of these fences at a public road." Sec. 126, Civil Code of Kentucky provides:

> "Every material allegation of a pleading, must for the purpose of the action be taken as true, unless specifically traversed, excepting, etc."

The exceptions to the rule do not apply here. Defendant's rejoinder did deny that this was *negligently* done—denies that it was negligence and denies it was the cause of the mule coming upon the track, but did not deny the fences terminated at the road without a cattle guard. Then the pleading of the railroad companies admitted that the public road crossed the track at that place and that the fences ran along the line of the waylands to and "terminated" at the public road and that there was no cattle-guard there.

THIS UNDER THE LAW OF KENTUCKY WAS AN ADMISSION OF ACTIONABLE NEGLIGENCE.

Section 1793, Ky. Statutes, provides:

> "That all corporations and persons owning or controlling and operating railroads as aforesaid, shall erect and maintain cattle-guards at all terminal points of fences constructed along their lines, (except at points where such lines are not required to be fenced on both sides,) and at public crossings."

And the Court of Appeals of Kentucky has repeatedly held that "neglect on the part of a railroad company to erect suitable cattle-guards at a public crossing and keep them in repair, when a Statute so requires, renders it liable" for injuries resulting therefrom to those to whom such duty is due. McGhee &c. Receiver vs. Guyn, 98 Ky., 209; McGhee vs. Ghains, 98 Ky., 182, and the case of McKee vs. C.

N. O. R. R. Co., 19 Ky., L. R. 1270. If a railroad company's negligence in this respect would make it liable for killing a steer, it would surely be liable for killing a *man* by the same negligence. But we do not have to argue about this.

The Court of Appeals of Kentucky in the case of Parrish vs. L. & N. Railroad Company, —— Ky., — 78 S. W. 186, 25 Ky. Law Rep., 1524, decides the point and shows by numerous references the doctrine to be elementary, that gives a right to any person who is injured by violation of a Statute on the part of another, and quotes from the case of the City of Henderson vs. Clayton, 22 Ky., Law Rep. 284, where it is said:

> "From time immemorial where a statutory duty for the protection of individuals has been violated, an action at common law might be maintained,' etc.

And the learned opinion in the Parrish case after quoting text writers, says that such was the intention of Section 466, Ky. Stat., which is as follows:

> "Sec. 466. A person injured by the violation of any statute may recover from the offender such damages as he may sustain by such violation, although a penalty or forfeiture for such violation be thereby imposed."

And not only does this section give a right to any one injured by a violation of any statute, but such would be true as shown by the many authorities quoted in the case, and this conclusion is supported

by the decisions of this Court. Hays vs. Mich. Cent. R. R. Co., 111 U. S., 228 (L. ed. 28, 410) decides the very point.

The opinion delivered by Mr. Justice Mathews says:

> "In the analogous case of fences required by statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons, by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence."

Thus it is seen not only that the law of Kentucky but the law announced by this Court would make the railroad company liable for the violation of Sec. 1793 of the Kentucky Statute, and an examination of the case of Parrish vs. L. & N. R. R. Co., supra, will show that the Kentucky Court of Appeals quoted different common law authorities in support of the position, and construed Sec. 466 of the Kentucky Statute to mean that such was the law.

The fencing of railroads was certainly as much meant to protect and preserve human life, as it was the life of cattle, and was meant to protect not only the passenger on the Palace car, but as well the humble stoker upon an engine whose duty requires him to be at his post in night or day and under all

circumstances. It would be hard to find a case more illustrative of the reasonableness of the position we have taken than the case at bar. The record shows that the accident occurred at night near a little station at which no agent was kept, but which was near a public road, and that the lines of fencing had come up to and terminated at the public road, and then run back along the line of the right-of-way and connected with a cattle guard or trestle 200 or 300 yards distant, thus forming a pocket or cul-de-sac; and that it was a great gathering place for cattle. The proof showed that the road was ballasted from the south to a point near the south end of this cul-de-sac and from the north to a point near the north end thereof, or near the public road, and that the road was fenced both north and south, and this gathering place for stock in the cul-de-sac was the very place where the road was rotten and defective. Thus, the road at that place was a menace. It was unknown to Engineer Sheegog, as the proof showed that he had but recently been transferred to that division, had passed over it but few times, and then in the night. So if it were true that the striking of the mule was the proximate cause of the accident, still the lessor and the lessee were both liable for leaving their road at such a place unprotected, and in violation of the Statutory law of Kentucky to leave the cattle guard unbuilt or defective. So, it was the position and contention of the plaintiff that the Chicago, St. Louis & New Orleans Railroad Company that owned the road and had presumably built the fences along the line of way lands to the public road, and failed to put in the cattle

guard and then failed to repair its soft, shifting, rotten and treacherous track, and also the lessee, the Illinois Central Railroad Company, that was operating its trains over this dangerous spot with full knowledge of the condition of the track and the gathering of the cattle there, and the conductor who was an old experienced conductor and fully cognizant of the state of affairs running the train at a high rate of speed without warning to Sheegog, the engineer, were all guilty of concurrent negligence in these respects, and the Court of Appeals of Kentucky sustained the contention of the plaintiff. The administrator then could not have been consistently charged with a fraudulent joinder, even if it be conceded that the striking of the mule was the immediate cause of the accident, for the negligence lay back of that; and if there were nothing but the absence of the cattle guard at the place where the Statute required it to be, if it was negligently omitted, the plaintiff would have a right to charge that as negligence, (and he did charge it) and though the track had been in perfect condition at that point, a cause of action would have been stated.

But, we maintain that all these things—the defective and dangerous track—the absence of cattle guard at the crossing where the fence lines terminated at the public road, making a place for the penning up of stray cattle at and on this rotten spot of track, the operating of trains over it at a high rate of speed without warning to the new engineer who was not aware of these things were all concur-

rent causes of the catastrophe that killed that engineer, his fireman and a brakeman at one fell stroke.

The objections made in assignments V, VI., and VII, have, we think, been fully met in the discussion of the previous assignments of error, and we shall not discuss them further than to say in answer to assignment VII, that under the decisions of this Court hereinbefore cited, the highest Court of the State of Kentucky certainly had the right to put its own construction upon Sec. 119 of the Kentucky Civil Code of Practice, a Kentucky Statute—it has done so, and we believe this Court will accept that construction as correct.

As before stated herein, the contention in assignment VIII is just the opposite of a contention in assignment II. In No. II complaint is made that the Court of Appeals of Kentucky erred in holding that the state Court might "inquire into the truth of the allegations of the petition for removal" and especially as to the allegations of fraud as to the joinder. Then in No. VIII, complaint is made because at the close of the trial on the merits and after a verdict was rendered in favor of two of the defendants, the State Court refused to hold the case removable. This is to contend that the State Court may hear the proof and determine therefrom whether or not the case is removable. This is not the law. The humble practitioners who represent defendant in error have steadily at all times maintained, and now maintain that no fact except a jurisdictional fact can make an issue on the question of removal, and

that fact is triable only in the Court of the United States and that if the petition for removal does not state facts making the case removable before a jury is called, and a jury becomes necessary, that alone shows the case is not removable, as the jury trial is a trial on the merits and a peremptory instruction to the jury to find for one of the defendants is—

> "A ruling on the merits and not a ruling on the question of jurisdiction."

Whitson vs. Smithson, 175 U. S. 635. In Whitsomb vs. Smithson, this Court says:

> "The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried."

The case of Smithson vs. Whitcomb was cited and approved in Kansas City Suburban Belt Ry., vs. Herman, 187 U. S. 63, 47 L. ed. 76; where the same question was again raised and again decided. In the case at bar there was no dismissal of the case as against any of the defendants. The liability was insisted upon to the end. More than that, the facts established the liability and the highest Court of the State so held. The lower Court—trial Court—was evidently of the opinion that the lessor corporation could not be held for the negligence alleged and proved, but the highest Court in the State held that it was actually liable.

Some reference is made in the petition for rehearing in the Court of Appeals to the decision of the

Federal Circuit Court upon the question of removal, but no question of that sort is made in the assignment of errors, and the record shows no effort was made to file any judgment or plea showing any judgment or order of the Federal Court. In fact, it will be seen from the record that this suit was filed October 22nd, 1903, that a trial was not reached until March 1905. If there had been any judgment of the Federal Court within that time there would have been ample opportunity to plead it, but it was not pleaded and none had been rendered, and the effort made after the close of the evidence, the instructions to, and the verdict of the jury in 1905 show that plaintiff in error depended upon obtaining a removal at the close of the evidence, and after the trial; and any judgment or orders that were rendered in the Federal Court, were rendered long after this judgment was obtained, and after the appeal was taken to the Court of Appeals of Kentucky and discussion of any orders, judgment or rulings of the Federal Court in this case seem to us to be idle, and we therefore decline to discuss them.

The killing of John E. Sheegog occurred on the —— day of May, 1903. The suit was filed the following October. Every obstruction and delay known to the law was interposed. Owing to the fact that one of the defendants was an employee of plaintiff in error and that it was exceedingly difficult on account of the fact that that employment was transferred to parts of the road in other States and plaintiff below had to watch carefully and wait long in order to

obtain service, a trial was not reached until March, 1905. After a trial in the Court that had jurisdiction and verdict and judgment an appeal was prayed to the highest Court of the State. That Court exercised the right to every Court of a sovereign state to construe the constitution, statute and code of practice of that state. It is almost impossible to mention any rule more firmly established or generally known than that the highest Court of a State is the highest authority for the construction of its Statutes.

This Court has repeatedly held that cases of the kind set forth by this record are not removable, and yet, after a petition for re-hearing in the Court of Appeals this appeal has been taken, or a writ of error bringing the case here and entailing upon the administrator and father of the unfortunate young man, the heavy expense and delay incident to such procedure.

We therefore respectfully suggest that under rule 23 of this Court, and the decisions thereof, including among others, Whitney vs. Cook, 99 U. S., 607, damages should be awarded in favor of defendant in error herein.

Respectfully submitted,

HENDRICK & MILLER,
Attorneys for Defendant in Error.

P. B. MILLER, of Counsel.

U. S.
NOV 8 1909
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY, OF THE STATE OF ILLINOIS, - - *Plaintiff in Error,*

vs.

ROBERT W. SHEEGOG, ADMINISTRATOR OF THE ESTATE OF JOHN E. SHEEGOG, DECEASED, - - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

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Ibid., 85; Dishon v. *C. N. O. & T. P. R'y Co., 133 Ibid., 471 (C. C. A.); Boatsmen's Bank* v. *Fritzlen, 135 Ibid., (C. C. A.) 650, 668 (certiorari denied 198 U. S. 586); South Dakota, etc., Co.* v. *Cin. & St. P. R'y Co., 141 Ibid., 578, 581, 2; Thomas* v. *Great North. R'y Co., et al., 147 Ibid., 83, 86 (C. C. A., 9th Circ.); Atlanta K. & N. R'y Co.* v. *Sou. R'y Co., 153 Ibid., 122, 126 (C. C. A., 6th Circ.); M'Guire* v. *Great North. R'y Co., 153 Ibid., 434, 439; Politz* v. *Wabash R'y Co., et al., 153 Ibid., 941; M'Alister* v. *Chesapeake & O. R'y Co., 157 Ibid., 740, 743 (C. C. A., 6th Circ.); Harrington* v. *Great North. R'y Co., 169 Ibid., 714; Donovan* v. *Wells Fargo, 169 Ibid., 363 (C. C. A., 8th Circ.).*

The State Court, therefore, had no jurisdiction to try or determine the question of fact tendered by the petition for removal, much lesss to try it on evidence heard only on the *merits*, and the outgivings by that court upon the voluminous evidence in the transcript are of no weight in this court upon consideration of this Writ of Error.

The State Court's observations, in its opinion, upon the evidence and its effect were made pursuant to the doctrine of that court announced in *Rutherford* v. *I. C. R. R. Co., 120 Ky. 15 (91 S. W. Rep. 255); Coley* v. *Ibid., 121 Ky. 385 (89 S. W. Rep. 234); Dudley* v. *Ibid., 127 Ky. 221 (96 S. W. 835)*; and *Underwood* v. *Ibid., 31 Ky. L. R. 595 (103 S. W. Rep. 322)*; the last three cases cited in the State Court's opinion (*Rec. 231*) holding that the State Court may try issues of fact upon a petition for removal, a doctrine unsound in principle and in conflict with the decisions of this court and all of the other Federal courts.

III.

Accordingly, when impairment of contract by State action is claimed this court will consider the question of the existence of such a contract, although the State Court may have determined its non-existence. *Keith* v. *Clark, 97 U. S. 453; Lou. Gas Co.* v. *Citizens Gas Co., 115 U. S. 683, 697.* Likewise when a Constitutional question consists in a question of fact or a mixed question of law and fact, as in the claim of a confiscatory rate, this court will itself determine the question of fact. *Smyth* v. *Ames, 169 U. S. 466; ex parte Young, 209 U. S. 123; similiter,* this court will consider the evidence, although the State Court has held upon the evidence that a Federal question is not involved, if this court recognizes that the decision of the State Court has for its premise "a cognizable mistake." (*T. H. & I. R. R. Co.* v. *Indiana, 194 U. S. 579; Schlemmer* v. *Buffalo, etc., R'y, 205 U. S. 1, 11*), although this court would treat as controlling the decision of the State Court upon a ground independent of the Federal question if adequate as well as independent. *Leathe* v. *Thomas, 207 U. S. 93, 99.*

IV.

Where the plaintiff joins as the real defendant's co-defendants persons known to be improper parties and fabricates averments concerning them in order to misstate their connection with the case, a petition for removal in alleging fraud in the joinder of the improper

defendants *may aver the untruth of the plaintiff's averments,* otherwise the right of removal to the Federal Court might always be frustrated by the plaintiff *ad libitum;* and the courts will be astute to prevent such devices, *Miller, J., 4 Dill. 277,* (quoted *57 Fed. R. 169* by Lurton, J.); *Gustafson* v. *R'y Co., supra* and *cases above cited; Crawford* v. *Illinois Central R. Co., 130 Fed. R. 395; C. R. I. & P. R'y Co.* v. *Stepp, 151 Ibid., 908;* and other cases cited *supra.*

V.

Although the State Court was without jurisdiction to try an issue of fact upon the petition for removal and the assumption of the State Court to pass upon the truth of the averments of such petition of itself entitles the Illinois Central to a reversal of the judgment now assailed, nevertheless the same result would follow a consideration of the case which the State Court assumed to try as arising upon the record, because it is demonstrable from the opinion itself that the State Court was not justified in holding (*Rec. 231*) that the derailment of Sheegog's engine—

> "was the proximate result of the failure of the lessor to perform its public duty in its failure to construct safe roadbed;"
> "when the track is properly constructed and reasonably well ballasted it was almost impossible for stock when struck to get under the train; the pilot would knock them off;" (*Rec. 223, see also 224*).

This unwarrantable speculation is too far-fetched to justify the joinder of the Kentucky Company upon the assumption that the supposed condition of its track caused the wreck in any such fantastic way as suggested by the State Court; see *Rec. 207, also 57, 62 and 208; Neeling* v. *C. St. P. & K. R. R. Co., 98 Iowa, 554, and Cox* v. *C. & N. W. R'y Co., 102 Iowa, 711.* If it were open to the State Court to consider the evidence at all, this court would on review determine for itself whether or not any reasonable ground existed for the observations of the State Court on the evidence; *cases cited supra under III.*

VI.

If the State Court had had jurisdiction to try the truth of the averments of the petition for removal it must have heard witnesses to that end. Instead of so doing the State Court tried the Illinois Central's averments on jurisdiction by evidence upon the merits, and as if it were trying the liability of the Kentucky Company, which had previously been dismissed. Its judgment is, therefore, reversible from any standpoint.

VII.

An independent ground of removal is that Sheegog, although suing the Kentucky Company and Durbin with the Illinois Central has made a separable controversy with the Illinois Central, *first*, in charging the derailment

of the engine to its having a stub pilot instead of a standard pilot, a separable controversy with which the Kentucky Company and Durbin had no possible connection; and, *secondly*, in charging the Illinois Central as primarily guilty of the wrongs ascribed to it, and the Kentucky Company as liable as owner and lessor of the railroad by virtue of *Sec. 203, Ky. Const.*, for injuries arising through defect of roadbed (but not of equipment), and Durbin as liable for failing to regulate Sheegog's rate of speed and permitting Sheegog to use a stub, instead of a standard pilot. Sheegog's case against the Illinois Central is a distinct cause of action on which a separate suit might be brought and complete relief afforded without any other party in court; *Barney* v. *Latham, 103 U. S. 205.*

Permission of State practice to join defendants does not prevent a separable controversy between plaintiff and one of them. *Kelly* v. *Railroad Co., 122 Fed. R. 286, 291; Williard* v. *Same, 124 Ibid., 796, 801; Yates* v. *Same, 137 Ibid., 943; Iowa, etc., R'y Co.* v. *Bliss, 144 Ibid., 446; Manf'g Co.* v. *Brown, etc., Co., 148 Ibid., 308, 310; South Dak., etc., Co. v. Railway, 141 Ibid., 578, 581; Stockton* v. *Oreg. Short Line, 170 Ibid., 627, 633; Wallin* v. *Reagan, 171 Ibid., 758, 763, 4.*

State legislation can not control Federal jurisdiction. *Hyde* v. *Stone, 20 How. 170, 175; Smyth* v. *Ames, 169 U. S. 466; Brow* v. *Wabash, 164 U. S. 271*, etc., etc., cited in brief.

Supreme Court of the United States

October Term, 1909.

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY
OF THE STATE OF ILLINOIS, - - - *Plaintiff in Error,*

vs. BRIEF FOR PLAINTIFF IN ERROR.

ROBERT W. SHEEGOG, ADMINISTRATOR
OF THE ESTATE OF JOHN E. SHEEGOG,
DECEASED, - - - - - - - - - *Defendant in Error.*

STATEMENT.

This is a writ of error to the Court of Appeals of Kentucky (*Rec. 235*) to review the judgment of that court affirming the judgment of the Union Circuit Court refusing to surrender jurisdiction to the Federal Court upon petition and bond for removal (*Rec. 232*).

Defendant in error, hereinafter called "Sheegog," instituted in the Union Circuit Court, Union County, Kentucky, an action (*Rec. 1*) against plaintiff in error, Illinois Central Railroad Company (hereinafter called

Illinois Central), the Chicago, St. Louis & New Orleans Railroad Company (hereinafter called "Kentucky Company") and F. J. Durbin, the conductor of the Illinois Central's train upon which John E. Sheegog, defendant's intestate, was riding when killed, hereinafter called "Durbin."

Sheegog's petition (complaint) alleges that decedent was the locomotive engineer of the Illinois Central upon a train derailed May 7, 1903, when that company was operating the railroad of the Kentucky Company, as its lessee, and that Durbin was the conductor of the train of which the decedent was engineer when killed, and that the derailment of the train "was through the joint and gross negligence and carelessness of the three defendants" (*Rec. 2, 3*).

The complaint was that the Kentucky Company was the owner of said road-bed, etc., where the accident happened, and the—

> "Illinois Central Railroad Company was the lessee of said railroad property and premises, and was the owner of the engine and cars, train and appliances by which the said intestate was killed, and was operating said road, trains, and engine, and the defendant, F. J. Durbin, who is a citizen of Kentucky, was the conductor in the employment of the latter railroad company, and in charge of said train and engine and appliances, and the said intestate was required to obey and was obeying and acting under the orders of the said defendant, F. J. Durbin."

The complaint further was that by the negligence of both said companies, the road-bed, etc., was in a defective condition—

> "and by the negligence of the Illinois Central Railroad Company, its engine and cars were knowingly allowed to be and remain in an improper, defective and dangerous condition, and its said engine and cars to be so constructed as to be in a dangerous condition, and this improper and dangerous condition of the said road, premises and cars of the defendants were known to the said defendants, and at the time of this said wreck and accident same were being operated in a careless manner by all of said defendants," etc.

The Illinois Central, an Illinois corporation, filed its petition and bond for removal (*Rec. 6*) admitting the ownership of the railroad by the Kentucky Company, the lease of such road to the Illinois Central, that decedent was petitioner's employe when killed, and averred that Sheegog, to avoid the removal of such action to the Federal Court, joined as petitioner's co-defendant the Kentucky corporation, and Durbin, petitioner's railroad conductor, and falsely and fraudulently made the allegations made by said Sheegog in his petition (complaint),

> "when the plaintiff (Sheegog) well knew that such allegations were untrue, and plaintiff did not expect to establish allegations, and did not make them for the purpose of proving them at the trial or of substantiating his cause of action therewith, but made them solely for the purpose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal Court" (*Rec. 8*).

The State Court (*Rec. 10*) permitted the petition and bond to be filed and found the surety solvent, but refused to surrender jurisdiction. The Illinois Central was therefore required to make its defense in the State Court, and a jury being impanelled returned a verdict against it for $8,250.00 (*Rec. 27*), *and under the court's instruction returned a verdict in favor of the Kentucky Company and the conductor,* (Durbin) (*Rec. 27, 192*), and the Illinois Central appealed to the Court of Appeals, the highest court of the State (*Rec. 28*) which affirmed the judgment of the Circuit Court (*Rec. 192, 221*).

From the judgment of the Court of Appeals the Illinois Central prayed a rehearing (*Rec. 204*), but the rehearing was denied after a modification of the opinion so as to eliminate certain recitals of things said in the original opinion (*Rec. 193*) to have been "conceded" by the Illinois Central. See corrected opinion (*Rec. 221*).

(After removal, and after a motion to remand was overruled, the case was fully tried in the Federal Court and decided for the Illinois Central; but this fact does not appear in the record, except in the petition for a rehearing (*Rec. 216*) and in the transcript of the record of the Federal Court if permitted to be filed.)

The court of Appeals, affirming the judgment of the State Circuit Court declining to surrender jurisdiction upon the filing of the petition and bond for removal, held, under the peculiar doctrines of that court (*Rutherford* v. *I. C. R. R. Co., 120 Ky. 15, 27 Ky. L. R. 397, 91 S. W. 255; Illinois Central R. R. Co.* v. *Coley, 121 Ky. 385, 28 Ky. L. R. 336, 89 S. W. 234; Dudley* v. *Illinois Central R. R. Co.,*

127 Ky. 221, 29 Ky. L. R. 1029, 96 S. W. 835), that the State court might, after refusing to surrender jurisdiction, hear the evidence and determine whether or not a fraud in the joinder of petitioner's co-defendants had been committed; and held that no fraud was committed in the joinder of the Kentucky Company because that company was liable to Sheegog upon the ground (*pp. 230-1*) "that the injury resulted by reason of its imperfect construction and maintenance of the rails and tracks of its road" or "its failure to construct a safe roadbed."

Durbin seems to have been forgotten both by Sheegog, and by the Court of Appeals, but the State court's refusal to surrender jurisdiction to have been based upon the supposed liability of the Kentucky Company, lessor, because of the alleged defective condition of its roadbed, said to have been unballasted. The opinion states (*p. 222*):

> "The defendant, Illinois Central Railroad Company, filed its petition and bond for removal of the case to the Federal court, alleging a separate controversy between it and appellee determinable between them without either of its co-defendants, and alleging joinder of its co-defendants in fraud of Federal jurisdiction. The court refused to transfer the case. Then each of the defendants filed a separate answer denying all material allegations of the petition.
>
> "The issues being completed a trial was had, which resulted in a verdict for appellee as against the Illinois Central Railroad Company for $8,250.00; and, on peremptory instructions, the jury found for the two defendants."

The ground of a separable controversy between petitioner, Illinois Central, and Sheegog was decided against the petitioner on very little discussion.

After much disquisition the court's opinion concludes, as its basis of decision, that the lessor is not bound to the lessee's employes for negligent operation except "the negligent omission of some duty to the public, such as the proper construction of its road, station houses, etc." (*p. 229*).

Again (*p. 230*):

> "In all cases where a valid lease is found (or as in this discussion, where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of relationship of employer and employe under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company when it attaches does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employe of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employe of the operating company by reason of the negligence of a fellow-servant, or of want and (of) care of the lessor (lessee?) company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and conclusively within the control of the lessee company, for injury which may result the lessor is in no way responsible. But, where injury has resulted to an employe of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employe may sue the lessor company,

> as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employe and employer, or any relation of contractual privity, exists. * * * So, here, the charge against the defendant is that the injury resulted by reason of its *imperfect construction* and maintenance of the rails and tracks of its road. *The verdict of the jury for plaintiff is its declaration that the charge was substantiated by the evidence,* and the nature of the omission or dereliction is such as to entitle the plaintiff to compensation from the defendant herein for injuries which may have resulted to him by reason of it.
>
> "This case is very similar to the one at bar, in which it was alleged and proven that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed." (*Italics ours.*)

There was no testimony that the road was not sufficient for fast travel, *nor that any accident had ever occurred from high speed,* nor any claim of any such accident; but Sheegog's theory of the defective track's being the cause of the derailment was that *had the track been ballasted with stone even with the tops of the ties* (and had a standard pilot instead of a stub pilot been employed), the mule would have been thrown from the track instead of being caught under the engine (as seems to have been assumed), and the derailment (peradventure) been escaped (*Rec. 207, 208;* also *56, 57, 58, 63*).

Sheegog's theory, in other words, was that if the mule were lying on the track with its feet toward the pilot there would be no room for its legs to go under the pilot if the track were ballasted, consequently the mule would

be thrown off; otherwise the pilot would mount the mule and be derailed (*pp. 63, 4*).

The Illinois Central (*Rec. 204*) filed a petition for a rehearing, which was overruled (*Rec. 221*), but the opinion previously delivered (*Rec. 193*) was "corrected on its face" by elimination of the recitals of concessions which in the first opinion the Illinois Central was declared to have made; see old opinion (*Rec. 193, et seq.*), and matter indicated in petition for rehearing (*Rec. 204, et seq.*).

ASSIGNMENT OF ERRORS.

The Illinois Central assigned error to the jugment aforesaid:

a. In the affirmance by the Court of Appeals of the judgment of the Union Circuit Court refusing to surrender jurisdiction when the petition and bond for removal were filed;

b. In the decision of the Court of Appeals that the case was not removed to the Federal Court upon the filing of the petition for removal and bond with surety as required by Act of Congress, and in its decision that the State court might nevertheless inquire into the truth of the allegations of the petition for removal and, especially, might try and determine the truth of the allegations of fraud in the joinder of the Kentucky Company and Durbin as the petitioner's co-defendants;

c. In the decision of the Court of Appeals that the Kentucky Company was not joined with petitioner, Illi-

nois Central, for the fraudulent purpose of preventing a removal to the Federal Court;

d. In the decision of the Court of Appeals that the allegation of Sheegog that the derailment of the engine causing the death of decedent was the proximate result of defect of track and roadbed of the Kentucky Company was not a fraudulent pretense and pretext to prevent removal of the case to the Federal Court, but that the defective condition of the track was the proximate cause of the derailment of the engine and death of decedent; and in said court's failing and refusing to decide that a collision of the engine with a mule upon the track was the proximate cause of the derailment of the engine and death of decedent, and that the claim of defect in the track was immaterial to the real cause of the derailment and death and was a false and fraudulent pretext, invented and asserted solely in order to assist in stating a cause of action against the Kentucky corporation to avoid removal to the Federal Court:

e. In the decision of the Court of Appeals that the question of negligence upon which the cause of action against the Kentucky Company was by Sheegog made to rest was not a jurisdictional fact and could not be inquired into on the trial of the question of removal;

f. In deciding that Sheegog, in his petition against the Illinois Central and its co-defendants, stated a cause of action against them upon a liability which was joint; and in deciding that the cause of action, if any, supposed to be stated, against the Illinois Central was not separable from that, if any, supposed to be stated against the Ken-

tucky Company, and that, if any, supposed to be stated against Durbin, the basis of the cause of action, if any, against the Illinois Central being its violation of its obligations to decedent as master, the basis of the cause of action, if any, against the Kentucky Company being not its tort, but its supposed liability arising out of its lease of its railroad to the Illinois Central, and the basis of the cause of action, if any, against Durbin being his failure to prevent the derailment of the engine;

g. In the decision of the Court of Appeals that the petition for removal was technically defective in failing to comply with Sec. 119 of the Civil Code of Practice, said Code being simply a collection of statutes enacted by the Kentucky Legislature regulating practice in civil cases in the State courts of Kentucky;

h. In the decision of the Court of Appeals that the case aforesaid did not become removable upon the action of the trial, or Circuit Court of the State in directing a verdict for the Kentucky Company and Durbin. (*Rec. 35, and 235.*)

ARGUMENT.

As appears from the statement, *supra,* as recited in the Appellate Court's opinion (*Rec. 222*), the Illinois Central petitioned for a removal upon two grounds, viz., fraudulent joinder of the Kentucky Company and Durbin as its co-defendants, and separable controversy between petitioner and Sheegog.

As, also, appears from the statement, *supra,* Sheegog claimed as the basis of his action defective track, etc.; the impropriety of a stub pilot instead of a standard pilot; and that Durbin had not done his duty. No showing whatever was made as to Durbin, *nor any pretense of one,* and the trial Judge's peremptory instruction to the jury in his behalf was a matter of course. The record does not contain even an apology for making him a defendant, nor does the court notice him as a party except to note the fact that he was. *There is no plausible excuse, therefore,* for denying that his joinder as a defendant was for the fraudulent purpose of preventing a removal of the case to the Federal court. Sheegog took care to allege (*Rec. 3*) that Durbin was "a citizen of Kentucky," an allegation constituting no constituent of a cause of action against him. The right of action would have been as complete had he been a citizen of another State.

Separable Controversy.

The controversy between petitioner and Sheegog is *separable* within the intent of the Act of Congress and of the authorities. The grounds urged by Sheegog for a judgment against petitioner and one against the Kentucky Company are radically distinct. Sheegog blames the derailment of the unfortunate engine on the use of a "stub" instead of a "standard" pilot (*Rec. 223*) and the unballasted condition of the track in question (*Rec. 223*), and makes no contention that the Kentucky Company

(lessor) had any blame for the pilot. The use of the "stub" pilot is blamed solely to the Illinois Central (lessee operating). On the other hand, the condition of the track is blamed to the Illinois Central because of its supposed *delinquency in so maintaining it* and to the Kentucky Company as the lessor, *liable under statutory enactment* (*Const., Sec. 203*) for the act of its lessee. Thus are two different causes of action propounded, and with that based on the complaint of the "stub" pilot, the Kentucky Company has no concern. Any evidence introduced to sustain the complaint of the "stub" pilot would be as to the Kentucky Company *res inter alios*, and, likewise, the constitutional provision introduced as evidence to hold the Kentucky Company liable for its lessee's acts would be, as to the lessee, *res inter alios*, the liability of the lessee (Illinois Central) existing or not existing, regardless of the constitutional provision invoked as the basis of the lessor's liability. The cause of action asserted against the Illinois Central is, therefore, in every sense, one which is *separable*, and can be fully determined as between the Illinois Central and Sheegog without the presence in the case of the Kentucky Company. The latter's presence is unnecessary to the determination of Sheegog's complaint of the acts of the Illinois Central either in using a "stub" pilot or in failing to ballast its track. *Sheegog's case against the Illinois Central is in every sense one that can be fully determined between them alone and without the presence of the Kentucky Company.* It is, therefore, exactly the case of removal provided for in the Act of Congress.

Not only could the controversy between Sheegog and the Illinois Central be fully tried and determined between them alone, but it was actually so tried, for the jury assessing damages against the Illinois Central found a verdict for the Kentucky Company under peremptory instruction of the court. Thus is the State court self-stultified in holding the Kentucky Company an indispensable party to a trial which actually proceeded in that court without the Kentucky Company, which had been dismissed from the case upon the eve of its submission to the jury. The Court of Appeals, too, must have spoken inadvertently when reciting (*Rec. 230*) that—

> "The verdict of the jury for plaintiff (Sheegog) is its declaration that the charge (that the injury resulted from the lessor's construction and maintenance of its track) was substantiated," etc.,

for we see that the jury found in favor of (and not against) the lessor under peremptory instruction from the judge.

The derailed engine belonged solely to the Illinois Central, lessee, and in stating Sheegog's case the State Court said (*Rec. 223*):

> "The proof shows that the engine was fitted with a stub pilot instead of a standard pilot. The stub pilot stood four or more inches above the rails and had but the slightest slant, that the standard pilot was very slanting, extended out in front of the engine four or five feet and rested only two inches above the rails and that, with it in use, when the track was properly constructed and reasonably well ballasted,

> it was almost impossible for stock, when struck to get under the train; the pilot would knock them off."

Thus is a "stub" pilot proclaimed not only an efficient cause of the derailment, but wellnigh the sole cause thereof. The court, however, proceeds (*Rec. 223*):

> "The testimony showed, without much contradiction, that the portion of the track described had never been ballasted, that the ties were laid on dirt, that much of it had been washed away so that it did not come to the top of the ties, that a track is properly ballasted when crushed stone, gravel or cinders are tamped under, upon and between the ties, and up to a point about even with the top of the rails * * * and that this track as constructed left about fourteen or sixteen inches from this stub pilot to the dirt between the ties, which made the chances of clearing the track of stock when struck by the pilot doubtful."

The *instant* case is not one of joint, or joint and several, liability in tort like *Ches. & O. R'y* v. *Dixon, 179 U. S. 131; Ala. G. S.* v. *Thompson, 200 U. S. 206;* and *C. N. O. & T. P. R'y* v. *Bohon, Ibid. 221,* for in such cases as those the tort complained of is actually the act of each defendant. The difference between such cases and the *instant* case is well illustrated by late Federal decisions.

In *Kelly* v. *Chicago, etc., R. Co., 122 Fed. R. 286, 291,* the vindication of the right of removal in the lessee, notwithstanding the joinder of the lessor where the State statute made the latter liable for the acts of the former, is an authority directly in point.

In *Williard* v. *Railroad Co., 124 Fed. R. 796, 801,* the court cited and followed Kelly v. Railroad Co., *supra,* upon a similar state of facts.

In *Yates* v. *Illinois Central R. Co., 137 Fed. R. 943,* the action against the lessee was held removable, although an employe of the lessor having duties respecting the trains of both lessor and lessee was accused of negligence conducing to cause the collision of trains upon the leased tracks in which plaintiff, the lessee's servant, was injured. The court (page 945) said:

> "The facts set out in the declaration must control the court in determining whether a separable controversy exists. The mere fact that a suit might be brought against each one of the defendants separately or against them jointly does not determine the question of whether a separable controversy exists or not" (citing authorities). "Nor do the allegations of the declaration that the act was the joint and concurrent act of the defendants add anything to the plaintiff's position" (citing authorities).
>
> "In order that the injury shall be the joint and concurrent act of both defendants, there must be a community of wrongdoing" (citing authorities).

The principle expounded in the cases of railroad leases just cited is illustrated by the decisions made in other cases where one defendant in a suit in a State Court is responsible for the act of his co-defendant and the case held removable. See *Iowa, etc., R'y Co.* v. *Bliss, 144 Fed. 446; Mfg. Co.* v. *Brown, etc., Co., 148 Fed. 308, 310,* etc.

It is immaterial to the right of removal on the ground of a separable controversy that under the State practice the several defendants may be properly joined. Indeed,

they may generally, if not always, be properly joined in cases where there is a separable controversy. The hypothesis required by the *Act of Congress* in cases of such removal is that there exists in the suit in the State court, where there are parties besides those to the separable controversy, a separable controversy which can be tried and determined without the presence of any of the petitioner's co-defendants. The circumstance, therefore, that the State court permits the plaintiff, or complainant, to join the several defendants does not affect the question of separable controversy between one of the defendants as petitioner and the plaintiff, or complainant. Were this not true no case under the Act of Congress could arise. Accordingly it is well said in *South Dakota, etc., Co.* v. *C., M. & St. P. R'y Co., 141 Fed. 578, 581,* a condemnation proceeding, where the State statute permitted the owners of separate tracts of land to be made defendants, quoting Mr. Justice Brewer's language in *Col. Mid. R'y Co.* v. *Jones, 29 Fed. R. 193:*

> "I do not suppose that a state can, by making special provisions for the trial of any particular controversy, prevent the exercise of the right of removal. If there was no statutory limitation, the Legislature could provide for the trial of many cases by less than a common-law jury, or in some other special way. But the fact that it had made such different and special provisions would not make the proceeding any the less a trial, or such a suit as, if between citizens of two states, could not be removed to the Federal courts. If this were possible, then the only thing the Legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

In *Kelly* v. *Railroad Co., supra,* where a state statute made a railroad company, leasing its railroad to a corporation of another state, liable as if it operated the road itself, and both lessor and lessee were sued, the court said, *p. 292:*

> "If it were conceded that the injured party might sue the lessor and lessee jointly, yet his election to do so ought not to deprive the non-resident defendant of the valuable right to invoke the jurisdiction of the Federal court, to get rid of the apprehended local influence, when its liability does not depend upon an issuable fact not common to both defendants. In other words, they are not joint tort feasors. The tort was committed alone by the Chicago & Alton Railway Company. * * * The plaintiff's right of recovery against one of the defendants depends upon the relation of lessor and lessee between the defendants, while against the other he may recover without such relation being established."

In *Iowa, etc.,* v. *Bliss, supra,* it is said, *p. 456:*

> "The present removal act clearly recognizes that a suit brought in a state court may, consistenly with the rules of pleading, rightly embrace several distinct controversies between the plaintiff and different defendants, and, if in such a suit there shall be a separable controversy of which the circuit courts of the United States are given original jurisdiction, its plain purpose is to give to the non-resident citizen actually interested in such controversy the right to remove the suit to the proper circuit court of the United States, though a citizen of the same State as the plaintiff or an alien may have been rightly made a party defendant to settle and determine other controversies between him and the plaintiff. It is in such a suit only that it is necessary to consider the

> relation of the resident defendant to the controversy or his citizenship in determining whether or not it is removable. *Barney* v. *Latham, 103 U. S. 205.*"

In *Mfg., etc., Co.* v. *Brown, etc., Co., supra,* where the maker and several endorsers of a promissory note were sued thereon in the State court by permission of a State statute, a separable controversy between the plaintiff, or complainant, and the defendant, petitioner, was declared to exist, the court saying that the liability of each defendant was several, notwithstanding the policy of the State to avoid a multiplicity of actions by permitting the joinder in a single action of the plaintiff's several causes of action. The court said, *p. 310:*

> "The cause of action does not become joint, or joint and several, from the mere fact that the plaintiff elects to avail itself of the statutory permission and unite parties in the same action. The plaintiff can not by such procedure make joint, or joint and several, what is necessarily several in its essential nature; nor can the plaintiff, by availing itself of the statutory provision, estop any defendant, liable solely upon its independent contract, from removing the action as regards such defendant to the Federal court, if the other conditions precedent to such removal be present."

See also *Stockton* v. *Oreg. Short Line, 170 Fed. R. 627, 633.*

Is the construction of the *Removal Act* resolvable by State practice? Can the State Legislature enlarge or restrain the right of removal by so manipulating State practice as to permit or eliminate separable controversies? There is nothing in the *Act of Congress* to intimate

the affirmative, but *e contra*, there is therein but one instance wherein State action is suggested as affecting the right of removal, as will be presently shown.

Our contention is that the construction of *Section 2 of the Act of March 3, 1887*, reaffirmed *August 13, 1888*, presents a *Federal*, and not a *State* question: that, accordingly, the judgment of *Federal courts*, and not of *State courts*, must be the criterion of Federal jurisdiction. This Act of Congress confers a right of removal in certain specified cases, and the State legislatures have no power to alter, amend or, forsooth, to abolish this Federal right, directly or *by indirection*. They have no right to add to nor subtract from the rights of any litigant under this statute. This Act of Congress is complete in itself; it provides for removal in a certain situation, *to wit*, when in a suit there be *a controversy wholly between citizens of different States which can be fully determined as between them alone*. This statute confers the right of removal, and was passed for that express purpose, upon a non-resident citizen finding himself involved in a controversy with a citizen of the State of the *forum* when the controversy is one determinable between them alone. This provision takes no account of *who may be parties to the action or suit in which the controversy be found*, nor of *what may be the rules of practice, whether common law or statutory, of the State in which the action or suit may be pending*. Indeed, the statute seems to *defy State procedure*, for the hypothesis upon which it is based is that *there may be a separable controversy* in a suit *properly brought*, and *rightly pending* in the State court. If

properly brought there all the parties to the suit are properly joined in the suit, and this controversy is properly joined with any other controversies therein, nevertheless, the case is removable to the Federal court *regardless of the State practice permitting the joinder of all the parties litigant, and of all the controversies involved.* Indeed, in the *Removal Cases, 100 U. S. 457, 468, 25 L. Ed. 593, 598,* and *Blake* v. *McKim, 103 U. S. 336, Book 26, pp. 563-4,* this court held that in a controversy between citizens of different States, either party might remove the case—

> "without regard to the position they occupy in the pleadings as plaintiffs or defendants. For the purpose of a removal, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute."

In *Evers* v. *Watson, 156 U. S. 527, 39 L. Ed. 520,* this court held that under the power to rearrange the parties and place them on different sides of the matter in dispute according to the actual facts, it would be presumed in the absence from the record of the petition for removal in order to sustain Federal jurisdiction, that the court did so arrange the parties.

In *Barney* v. *Latham, 103 U. S. 205, 26 L. Ed. 514,* this court held that when a removal of a separable controversy was effected, the entire suit was removed to the Federal court and that the right of removal was not affected by the fact that a defendant, a citizen of the same State as plaintiff, might be a *proper* but not an

indispensable party to the separable controversy between citizens of different States.

These decisions proceed upon the assumption, and necessarily imply, that a controversy between two persons, citizens of different States, may exist in any suit, properly pending in a State court, and be separable from the rest of the suit and determinable between those two persons of diverse citizenship; and in so determining, no account whatever is taken of the question whether or not in the State court such controversy would be regarded as separable from the rest of the suit, or as determinable between the petitioner for removal and his adversary in the controversy alone. There is no intimation that such controversy must be separable according to any rule of practice in the State court, nor that the question whether or not it might be determined without the presence of other persons must be decided according to State practice, *e contra,* the conclusion from the decisions just noted is that the controversy may be separable and its determinability between the assumed parties only exist regardless of what the State court might require as to joinder of different persons. The statute is meant to operate in all the States, and nevertheless the practice in any of those States may differ from that in any other State. There is no intimation in the statute that the separableness of the controversy, or its determinability between the citizens of different States is to be determined by the practice, or the statutes of any State.

Conformably with the doctrine we urge it is uniformly held that Federal jurisdiction can not be abridged or modified by any State statute.

In *Hyde* v. *Stone, 20 Howard, 170, 175, 15 L. E. 874,* this court said:

> "But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States can not be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

See also *Smyth* v. *Ames, 169 U. S. 466, 42 L. Ed. 819.*

In *Brow* v. *Wabash, 164 U. S. 271, 41 L. Ed. 431,* this court holding that a petition for removal did not waive irregularity in the service of process in an action in a State court for personal injury against a railroad company, quoted from *Goldey* v. *Morning News* that:

> "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and can not be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional Act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. * * * Although the suit must be actually pending in the State court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the State court, or that the defendant could have been compelled to answer therein," etc. (*pp. 276, 277*).

These principles, so thoroughly settled by the decisions of this court, establish that State legislation can not control the construction of the Removal Act.

There is a single instance found in the Removal Act wherein State practice is controlling, *to wit*, the enactment as to the time when the petition for removal must be filed, *viz.*, when the defendant is required by the *State law and rules of the State court* to answer the complaint. In this instance the State may absolutely control the time when the petition for removal must be filed, but may do so, not by virtue of State power, but by permission of Congress expressly conferred in the Act itself. This is the only instance in which any power or authority to affect in any manner the right of removal is conferred by the statute upon any State tribunal, and the grant of the right in this instance excludes the idea that it is granted in any other particular; *expressio unius, exclusio alterius.*

Accordingly, when the Removal Act provides for removal of a separable controversy it means such controversy as a just construction of that Act of Congress would decide to be separable, *i. e.*, one that could be fully determined between the parties in question, and not such controversies only as the State courts or State legislatures might declare separable when, perhaps, so contriving as to prevent removal to the Federal court.

The distinction between this case and *Ala. G. S. R'y Co.* v. *Thompson, 200 U. S. 206,* and *C. N. O. & T. P. R'y* v. *Bohon, Ibid. 221,* is that in the latter cases this court held that there was no separable controversy between the

plaintiff (complainant) and the master where the guilty servant was sued jointly with the master. In those cases the master and servant were held to be *joint tort-feasors.* The masters were not merely bound collaterally in those cases for the torts of their servants, but both the masters and servants were *tort-feasors.* The masters were the primary actors, although acting through their servants. In the *instant* case the lessor was no participant in the operation of the railroad and was in no sense a tort-feasor, *a fortiori* not a joint tort-feasor with the lessee. The Kentucky Company had leased its railroad by valid lease. This is conceded. The State Court says (*Rec. 230*):

> "In all cases where a valid lease is found (*or, as in this discussion, where it is assumed*), the lessor owes no duty whatsoever as an employer to the operatives of the lessee company." (*Italics ours.*)

This case, therefore, is unlike the cases just cited.

The lessor's liability to Sheegog in the *instant* case is predicated upon the assumption that by *Sec. 203, Ky. Const.,* the lessor is made liable for certain acts or omissions of its lessee, not for all (*e. g.,* the use of a "stub" pilot), but for some. There was no privity between the lessor and Sheegog as there was between the *Ala. G. S. R'y Co.* and the *Cin., N. O. & T. P. R'y Co.* and their respective employes who sued them. The cases hereinbefore invoked, therefore, are controlling upon this case, and the *Thompson* and *Bohon* cases are distinguishable. Accordingly, we submit that under a sound construction

of the *Removal Act* there is a separable controversy between the Illinois Central and Sheegog, notwithstanding the Kentucky Company is sued as petitioner's co-defendant.

II.

Fraud on Jurisdiction.

A sufficient ground of reversal entirely independent of that just discussed is the fraudulent joinder of the Kentucky Company and Durbin to defeat Federal jurisdiction. This subject has of late become of great importance in jurisprudence.

> "It would be a very dangerous doctrine—one utterly destructive of the right which a man has to go into the Federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in Federal courts. We must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right;" quotation from Mr. Justice Miller (*4 Dill. 277*) by Lurton J., in *57 Fed. R. 169.*
>
> "If this growing practice be further extended, (of fraudulent joinder of parties to prevent removal), under a latitudinarian construction, beyond what was really decided in the Dixon case, and those in consonance therewith, the practical result is to be a denial to non-resident corporations of the right of removal from the local to the Federal courts. The persistent insistence of attorneys for such plaintiffs is that just in so much as, by mere allegation in the

petition, a joint cause of action can be apparently stated, regardless of the motive of the pleader and the underlying facts, they may effectually cut off even a technical analysis of the petition, to see whether in point of law a joint cause of action is stated, and any resort to evidence *in pais* on the issue of removal and remand." *Gustafson* v. *R'y Co., 128 Fed. R. 85, 88.*

"And as already stated, even where the petition on its face alleges a joint cause of action, or some joint acts of the defendants, the non-resident defendant may challenge the truth of it in his petition for removal by alleging that it was inserted for the purpose of preventing the exercise of the right of removal by the non-resident defendant, and this issue of fact is to be determined by the United States court." *Ibid., 88.*

In *Plymouth, etc., Co.* v. *Amador, etc., Co., 118 U. S. 264-270,* this court said:

"The averments in the petition, that the defendants were wrongfully made to avoid a removal can be of no avail in the Circuit Court upon a motion to remand, until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant."

In *Louisville, etc., R. R. Co.* v. *Wangelin, 132 U. S. 599-601,* this court said:

"The question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner—unless the petitioner both alleges and proves that the de-

fendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court."

In *C. & O. R'y Co.* v. *Dixon*, *179 U. S. 131*, this court said:

"The petition for removal did not charge fraud in that regard, or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry."

In *Alabama Great Southern* v. *Thompson*, *200 U. S. 218*, this court said:

"It is to be remembered that we are not now dealing with joinders, which are shown by the petition for removal, or otherwise, to be attempts to sue in the State courts with a view to defeat Federal jurisdiction. In such cases entirely different questions arise, and the Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals."

And in *Wecker* v. *National, etc., Co.*, *204 U. S. 176*, this court said:

"While the plaintiff, in good faith, may proceed in the State courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction."

In *Ches. & Ohio R'y Co., et al.*, v. *McCabe, Admx., 213 U. S. 207,* April 5, 1909, this court, reversing the judgment of the Kentucky Court of Appeals because that court declined to give full faith and credit to the judgment of the Federal court in the case when pleaded in the State court before judgment therein and after motion to remand was overruled in the Federal court, said "that the Circuit Court of the United States may determine the question of the right of removal is conclusively shown by the terms of the statute governing the subject," and after citing *1 Comp. Stat. 510, Secs. 3, 5,* this court further said, *p. 216:*

> "It is apparent that these provisions are intended to confer jurisdiction upon the United States Circuit Court to determine for itself the removability of a given cause, and it has been accordingly held in this court that, notwithstanding the refusal of the State court to remove the case, the party desiring the removal may file a transcript of the record in the Circuit Court of the United States, and if the case was a removable one it is immaterial that the State court has denied the petition for removal. *Kern* v. *Huidekoper, 103 U. S. 485,* and cases therein cited. And it was held in *Traction Company* v. *Mining Co., 196 U. S. 239,* that notwithstanding the refusal of the State court to make an order of removal, the controversy being removable to the United States Circuit Court, that court might protect its jurisdiction by injunction against further proceedings in the State court.
>
> "In view of these provisions of the statute and the decisions of this court construing the same we think it was the intention of Congress to confer upon the Circuit Court of the United States a right to de-

termine the removability of a cause, independently of the jurisdiction and determination of the State courts."

Further said:

"In order to prevnt unseemly conflict of jurisdiction it would seem that the State court in such cases should withhold its further exercise of jurisdiction until the decision of the Circuit Court of the United States is reviewed in this court. If the Federal jurisdiction is not sustained the case will be remanded with instructions that it be sent back to the State court as if no removal had been had."

In *Wecker* v. *Nat. Enameling Co.* (*204 U. S. 176, 182*), *Ala. G. S. R. Co.* v. *Thompson,* was distinguished upon the ground that there was in that case no claim of fraud. In the Wecker case plaintiff sued his employer, a corporation into whose vats of hot grease he fell and was injured, and its two servants whom he accused of having the duties of superintendence. The corporation petitioned for removal to the Federal court, and the question discussed arose in the Federal court upon a motion to remand. The remand was refused, and the plaintiff electing to stand upon his motion his case was dismissed, and the Circuit Court certified (*p. 180*):

"That the only question decided by the court in the cause was that the joining of Wettengel (a servant) as a co-defendant with the company was palpably groundless and fictitious, and for the purpose of unlawfully depriving the defendant company of its right to remove the cause to the Federal court for trial." The judgment of the circuit court was affirmed.

Among other grounds for this court's decision it was declared (*p. 185*):

> "In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court."

On the question of plaintiff's knowledge of the real facts this court said (*p. 185*):

> "It is objected that there was no proof that Wecker knew of Wettengel's true relation to the defendant, and consequently he could not be guilty of fraud in joining him, but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach."

These citations of this court's decisions and quotations of its language make very plain the exposition of certain principles which have been sadly lost sight of by the Kentucky court in the decision now challenged.

The distinction which this court made of the *Alabama Great Southern* case in *Wecker* v. *Nat. Enameling Co.* establishes that it is only in the interpretation of the question of separable controversy that the plaintiff's averments are treated as conclusive, and a just survey of all the cases cited demonstrates that the petitioner seeking removal may show that co-defendants are made, and averments concerning them and the case falsely fab-

ricated to prevent removal, and that the petitioner is not precluded from so doing by the form or the averments of the plaintiff's petition or complaint. Such a survey further demonstrates that only the Federal court can hear evidence upon the truth of the averments of a petition for removal and that, therefore, the State court must accept the averments of such a petition as true because both State and Federal courts can not try the same questions of fact.

Federal cases, some of them very late, are of value in this connection because they apply and exemplify the principles so clearly expounded in the decisions of this court just reviewed. See *Dow* v. *Bradstreet, 46 Fed. R., 824; Arrowsmith* v. *N. & D. R. R. Co., 57 Ibid., 165; Diday* v. *N. Y. P. & O. R. Co., et al., 107 Fed. R. 565; Union Terminal R'y* v. *C. B. & Q. R. Co., et al., 119 Fed. R. 209; Kelly* v. *C. & A. R. Co., 122 Ibid., 226; Gustafson* v. *R'y Co., 128 Ibid., 85; Dishon* v. *C. N. O. & T. P. R'y Co.* (*C. C. A., 6th Circ.*) *133 Ibid., 471; Boatmen's Bank* v. *Fritzlen, 135 Ibid.,* (*C. C. A., 8th Circ.*) *650, 668* (*certiorair denied 198 U. S. 586*); *South Dakota, etc., Co.* v. *Cin. & St. P. R'y Co., 141 Ibid., 578, 581, 2; Thomas* v. *Great North. R'y Co., et. al., 147 Ibid., 83, 86* (*C. C. A., 9th Circ.*); *Atlanta K. & N. R'y Co.* v. *Sou. R'y Co., 153 Ibid., 122, 126; M'Guire* v. *Great North. R'y Co., 153 Ibid., 434, 439; Politz* v. *Wabash R. Co., et al., 153 Ibid., 941; M'Alister* v. *Chesapeake & O. R'y Co., 157 Ibid., 740, 743* (*C. C. A., 6th Circ.*); *Harrington* v. *Great North. R'y Co., 169 Ibid., 714; Donovan* v. *Wells Fargo, 169 Ibid.,*

363 (C. C. A., 8th Circ.); Wallin v. *Reagan, 171 Ibid., 758, 763, 4 and cases therein cited.*

We shall not, in this court, review the authorities just cited from the subordinate Federal courts, but shall only notice some of the more recent utterances of those courts applying the doctrines of this court.

In *Atlanta K. & N. R'y Co.* v. *Sou. R'y Co., supra,* the court, Lurton, J., speaking, said (*153 Fed. R. 126*):

> "Averments of fact in a petition to remove, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will entitle the circuit court to maintain its jurisdiction. *Dishon* v. *C. N. O. & R. Co., 133 Fed. 471, 474, 66 C. C. A. 345.*"

In *M'Guire* v. *Great North. R'y, supra,* where connecting carriers and a station agent were joined the court, concerning fraudulent joinder, said (*153 Fed. R. 439*):

> "It is true that the Supreme Court holds that when a plaintiff in good faith prosecutes his suit as upon a joint cause of action, and a removal is sought alone upon the allegations of the plaintiff's petition, the cause of action as therein stated is the test of removability, and if that is joint in character, and there is no showing of want of good faith on the part of the plaintiff in stating his cause of action, the question of proper joinder is not to be tried in the removal proceedings, and the case must be held to be that which the plaintiff states in setting forth his cause of action. But this rule has no application where it is alleged and shown by the non-resident defendant that the plaintiff has purposely stated a fictitious cause of action against him and another

jointly, to prevent a removal of the cause to the Federal Court. In such cases the duty is strictly enjoined upon the circuit courts of protecting the right of removal to one having such right, as well as to deny the removal when the right to do so does not exist. *Alabama Great Southern Co.* v. *Thompson*, above.

In *Wecker* v. *National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed.*, it is said:

'While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal court should not sanction devices intended to prevent a removal to a Federal court, where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction.'

"To deny the jurisdiction of this court in this case would be to sanction a device that is thus condemned by the Supreme Court."

In *M'Alister* v. *Ches. & O. R'y Co., supra,* the court, Richards, J., speaking, where a lessor railroad company was fraudulently joined to prevent removal said (*157 Fed. R. 743*):

"A case for removal was stated on the face of the petition for removal. The question as to whether the Maysville & Big Sandy Railroad Company had been joined as a defendant 'for the sole and simple purpose of preventing a removal, and with no intention whatever on the part of plaintiff to prove any of the acts of negligence alleged in the petition against said co-defendant, or to prosecute the alleged cause of action against said co-defendant' was an averment of fraudulent misjoinder which prima facie entitled the Chesapeake & Ohio Railway Com-

pany to remove the cause as a separable controversy. *In Wecker* v. *National Enameling, etc., Co., 204 U. S. 176, 186, 27 Sup. Ct. 184, 188, 51 L. Ed. 430,* Mr. Justice Day, for the court, said:

'While the plaintiff, in good faith, may proceed in the State courts upon a cause of action, which he alleged to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the State courts, in proper cases, to retain their own jurisdiction.'

If no issue was made upon the averments of fraudulent joinder, a motion to remand could not be sustained. *Dishon* v. *C. N. O. & T. P. R'y Co., 133 Fed. 471, 66 C. C. A. 345; Kentucky* v. *Powers, 201 U. S. 1, 33, 34, 26 Sup. Ct. 387, 50 L. Ed. 633.*"

The very late decision, (April 5, 1909) in *Donovan* v. *Wells Fargo & Co., supra,* so fully considers and well expounds the principles which we invoke upon authority of this court's decisions, as almost to supersede the necessity of further discussion. The action was for negligence in handling a horse transported by the express company, and one McKee was joined as the express company's co-defendant. The express company petitioned removal to the Federal Court alleging in its petition, among other things, diversity of citizenship between petitioner and plaintiff, a separable controversy between them, and a fraudulent joinder of McKee to defeat the removal. The State Court ignoring the removal proceedings, a transcript was filed in the Federal Court. An injunction was

granted by the Federal Court against plaintiff's proceeding further in the State Court, and the judgment was affirmed.

The court (*169 Fed. R. 366*) said:

> "When the right of removal is made to depend upon the existence of certain facts, they must be taken by the State Court to be true as averred in the petition. If it is desired to controvert such facts or any of them, the plaintiff must make an issue with respect to them in the Federal Court, and that issue must be tried in that court. *Stone* v. *South Carolina; Carson* v. *Hyatt; Railway Co.* v. *Dunn; Crehore* v. *Ohio, etc., R'y Co., supra; Chesapeake & O. R'y Co.* v. *McCabe* (decided April 5, 1909), *29 Sup. Ct. 430, 53 L. Ed. —; St. Louis Southwestern R'y Co.* v. *Adams* (*Ark.*), *112 S. W. 186.* If the State Court refuses to make the order of removal on the showing made by the face of the record, the defendant may nevertheless, within a prescribed time, enter a copy of the record as it stood, on the filing of the petition, in the proper Federal Court and have the cause docketed there. Thereupon the latter court is required to proceed in the exercise of the jurisdiction lost by the State Court upon the filing of the petition and bond with it. *Railroad Co.* v. *Koontz, 104 U. S. 5, 26 L. Ed. 643; Railroad Co.* v. *Dunn, supra.*"

Again said (*p. 367, 8*):

> "If it (petition for removal) fails to state facts sufficient to entitle the petitioner to a removal—in other words, if it is demurrable on its face—the State Court may properly decline to order the removal, and it will not lose jurisdiction of the cause. But if it is not demurrable—if the facts, however inartificially stated, disclose the right of removal—

jurisdiction is lost to the State Court and is lodged in the Federal Court. Cases *supra.*

Tested by well-recognized rules of pleading, the petition for removal was good. It stated the ultimate facts which, in law, entitled the express company to remove the cause, notwithstanding the joinder of McKee. Even if there was a deficiency of detail with respect to what constitutes the alleged fraud, the petition might have been amended in the Federal Court by making a fuller statement of the facts undertaken to be alleged in the petition; or, in other words, it might have been amended so as to 'set forth in proper form what had before been improperly stated.' *Carson* v. *Dunham, supra.*

As plaintiff Donovan failed to appear in the Federal Court and deny the allegations of fraudulent joinder, the petition for removal might in due time have been taken as confessed, and the cause have proceeded in the usual course of practice. When issue is joined on allegations of the petition for removal, and not till then, the burden of establishing the affirmative thereof rests upon the petitioner. Judge Dillon, in his Removal of Causes, Sec. 158, says:

'If the petition, in connection with the record, is sufficient on its face, but states as ground of removal facts which are not true, * * * issue may be taken thereon in the circuit court by a plea in abatement; but such an inquiry can not be gone into in the State Court.' "

After review of authorities the court said (*p. 369*):

"Instead of taking either of these courses, he (plaintiff) ignored the tribunal which alone could lawfully determine the issue, sought to deprive it of the jurisdiction conferred upon it by law, and persisted in his attempt to subject the express company

to the jurisdiction of the State court which on the face of the record had been lost."

Again the court said (*p. 371*):

"As already observed, the law devolves a duty upon the circuit court to pass upon and determine the questions of fact upon which the right of removal depends. The petition for removal, taken by itself or with the complaint in the case, tenders the issue determinative of the right. If the plaintiff disputes the right, he must meet the issue so tendered, and, most obviously, he must do it in the court and in the cause in which it is tendered. That court in that pending cause has the exclusive jurisdiction to hear and determine that issue. Cases *supra.*

The court below, instead of hearing and finally determining the issue as to the fraudulent joinder of McKee, should have, after finding that the petition for removal stated on its face a good ground therefor, enjoined Donovan from proceeding further in the State Court until he should appear in the Federal Court and join issue in the cause there docketed with the express company on its allegations of fraudulent joinder, and secure an adjudication of that issue in his favor. The decree is accordingly reversed, and the cause remanded to the circuit court with directions to enter a decree as above outlined."

The decisions hereinbefore cited finally establish very clearly what has not always been understood but when properly expounded becomes very obvious. If the truth of a complainant's allegations could not be controverted removal of any cause could be prevented merely by the device of uniting as the non-resident's co-defendant a citizen of the State of the *forum* and making such allegations concerning him as manifested a joint liability of all the

defendants. *If such a device could prevail no complainant need permit the removal of his case to the Federal Court against his consent.* This truth seems to have entirely eluded the grasp of the State Court, for although that court sometimes says (*Rec. 224, 5*):

> "And it was the duty of that court (Federal Court) to hear the proof on the jurisdictional facts or questions raised by the petition for removal, and determine whether the Federal Court or State Court had jurisdiction of the case,"

the State Court evidently refers solely to *diversity of citizenship,* and *the like,* as the jurisdictional facts, for it declared (*Rec. 226*):

> "As stated, a joint cause of action was alleged in the petition of appellant against all three of the defendants. * * * The petition for removal denies the negligence charged in the petition. This is not a jurisdictional fact under all the authorities."

That we do not misconstrue the meaning of the State Court is evident from the language of the same judge in *Rutherford* v. *Illinois Central, 120 Ky. 15; 91 S. W. Rep. 255,* where it was said:

> "The averments in a petition for removal of a cause of action from a State to a Federal court must be restricted to matters of fact touching the jurisdiction of the court, and all allegations concerning the merits of the case are superfluous and immaterial. The merits of the case are exclusively within the province of the jury trying the case in the court having jurisdiction thereof," citing and misconstru-

ing *L. & N. R. R. Co.* v. *Wangelin, 132 U. S. 599, Blackburn* v. *Port F. & M. Co., 175 U. S. 281,* and *Bushnell* v. *Cooke, 148 U. S. 682,"*

and his language in the *instant case* (*Rec. 231*) reciting that in the Coley, Dudley and Underwood cases—

> "This court recognized the rule to be that, although the petition for removal of the case failed to allege any jurisdictional facts which would authorize the removal of the case, yet if on the trial it is developed that the plaintiff in the action had not reasons for believing that the resident defendants in the action were responsible to him in damages, and it is made evident that their joinder as defendants with the non-resident was made for the purpose of depriving the Federal Court of jurisdiction to try the case, then this court will reverse and remand with directions to the lower court to remove the case to the Federal Court."

The error into which the State Court fell when making these enunciations is, of course, its failing to recognize that facts might be equally constituents of the "merits" and of "jurisdiction." It recognized that "citizenship" and "amount in controversy" were jurisdictional, but failed to accord such effect to any other facts. Why being an element of jurisdiction should be confined to *citizenship* or *amount in controversy* is not explained. Indeed, the State Court is singularly inconsistent because it insists that the *statement of a joint cause of action* is not only *jurisdictional* but conclusive of State jurisdiction and, nevertheless, denies that the elements of that cause of action are *jurisdictional.* The only reason suggested by the State Court for their not being jurisdic-

tional is that they are elements of the "merits" and that the "merits" are for consideration only at the final trial. In support of this decision the *Wangelin case* is invoked.

That facts might be jurisdictional and nevertheless material to the merits, and that some facts might be considered upon the trial of jurisdiction and of the merits is strangely, indeed, denied by the State Court. In *M'Guire* v. *R'y, supra,* the court manifested its appreciation of the truth of the situation when saying (*153 Fed. R. 437*):

> "The merits of the controversy may be considered only for the purpose of ascertaining the real nature of the alleged cause or causes of action of the plaintiff against the several defendants, and whether or not there has been a fraudulent joinder of parties defendant with the Great Northern Co. for the purpose of defeating the jurisdiction of this court," citing *Ala. Great Southern* v. *Thompson, supra,* and *Wecker* v. *Nat. Enameling Co., supra.*

Under the doctrine of the State Court the joinder of anybody as co-defendant might be successfully effected by the fabrication of such an account of his connection with the cause of action as fortified the plaintiff's statement of his case against the demurrer of the co-defendant. Removal could, therefore, be defeated by any one having sufficient ingenuity and knowledge of law to state a good cause of action against the co-defendant fraudulently joined. That the doctrine propounded by the State Court receives no support from this court's decisions in the *Wangelin, Blackburn* and *Bushnell* cases appears from a very brief notice of them.

In the *Wangelin* case (*132 U. S. 599*) two corporations were sued jointly and the attempt to remove was for a *separable controversy*. The decision against the removal was that the question was triable upon the petition for removal and the record as it existed when the petition was filed. This is always true of the question of *separable controversy*, but this court in that case nevertheless said that the petitioner might show improper joinder of defendants "for the purpose of preventing a removal into the Federal Court."

In the *Bushnell* case (*148 U. S. 682*) no question of removal was involved—the writ of error was dismissed because the Federal question was not raised in due time.

In the *Blackburn* case (*175 U. S. 571*) no removal was mooted—the action was brought in the Federal Court.

The cases invoked by the State Court, therefore, except the *Wangelin* case, have no application in the *Rutherford* case, and the *Wangelin* case, as just shown, does not support the decision.

Upon principle as well as authority it is accordingly demonstrated that the State Court erred in not accepting the averments of the petition for removal as true, and erred in considering the evidence heard in the trial court upon the merits to determine the jurisdictional question of fraud *vel non. This error alone is decisive of the Illinois Central's right to a reversal.*

Not only did the petition for removal set up the fraud in the joinder of petitioner's co-defendants for the purpose of defeating Federal jurisdiction (*Rec. 7, 8*), but

the State Court, as shown, *supra*, recognized (*Rec. 222*) that the petition for removal alleged—

> "A *separable controversy* between it (petitioner) and appellee (Sheegog) determinable between them without either of its co-defendants," and alleged "joinder *of its co-defendants in fraud of Federal jurisdiction.*" (*Italics ours.*)

Nevertheless, the State Court affirmed the trial court's refusal to surrender jurisdiction upon the ground (*Rec. 230, 1*):

> "It was alleged and proved that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed."

The State Court thus ignores the obvious fact that the petitioner, Illinois Central, charged fraud in the allegations of Sheegog to which the court alludes, and that the so-called *proof* of Sheegog's allegations consisted in testimony heard in the State Court which could not be considered on the issue tendered by the petition for removal, *but that the Federal Court alone had jurisdiction to hear evidence on that issue.*

The action of the Federal Court after removal, whether upon motion to remand or after refusing to remand, can not be pleaded in the State Court unless such action be had before trial in the State Court following its refusal to surrender jurisdiction; *but the same result is attained by the well-established principle that the State Court must accept the allegations of the petition for re-*

moval as true and as having all the effect which could be given to them by the Federal Court after having heard the evidence on the motion to remand. Were it otherwise, as pointed out by this court in *Railway* v. *Dunn,* (*122 U. S. 517*), there would be fatal conflict, this court saying:

> "But, in as much as the petitioning party has the right to enter the suit in the circuit court, notwithstanding the State Court declines to stop proceedings, it is easy to see that if both courts can try the issues of fact which may be made on the petition for removal, the records from the two courts brought here for review will not necessarily be the same. * * * It must rest with one court alone, and that, in our opinion, is more properly the circuit court" (Federal Court).

The whole situation, however, is now very fully expounded in *Ches. & O. R'y Co.* v. *McCabe,* as quoted *supra.*

The State Court overlooks the obvious truth, expounded in this court's decision just cited, that the Federal court may be deciding the same question upon the same or different evidence, at the same time, reaching the opposite conclusion, and *having the exclusive jurisdiction to decide the question.*

The State court spoke *coram non judice* when it expounded, *from the evidence heard upon the trial* (*of the merits*) *of the case in the Union Circuit Court,* that the Kentucky Company, lessor, was liable for the death of the Illinois Central's engineer, an employe of its lessee, upon the ground that his death—

> "Was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed" (*Rec. 231*).

The State Court's predicament is appreciated when it is realized that its decision is not only based upon its view of the evidence which the State Court had no jurisdiction to hear, but that such evidence was not even heard on the question of jurisdiction, but heard on the merits of the case. While, therefore, the State Court was declaring that the question of negligence, or liability, was a question upon the merits and not on jurisdiction and, therefore, could not be considered upon a trial of the question of jurisdiction, it nevertheless proceeded to try the question of jurisdiction not only upon evidence of negligence or liability, but such evidence given upon the final trial of the merits and not upon a trial of the question of jurisdiction.

The conclusion reached by the State Court was, consequently, of no materiality whatever to the case before it, but was an unauthorized deduction from that testimony; and a deduction, too, different from that which would naturally be expected from the Federal Court if the testimony in that court were the same (no more, nor less) as in the State Court.

As the basis of its conclusion that the derailment was the "proximate result" of the lessor's "failure to construct a safe roadbed" (*Rec. 231*) the State Court declared (*Rec. 233*):

> "The testimony showed, without much contradiction, that the portion of the track described had never

been ballasted, that the ties were laid on dirt, that much of it had been washed away so that it did not come to the top of the ties, that a track is properly ballasted when crushed stone, gravel or cinders are tamped under, upon and between the ties, and up to a point about even with the top of the rails," etc.

Also (*Rec. 224*):

"Many witnesses testified that they had been at this point when trains passed and saw that the track was insecure, that engines and cars would wabble in passing over it, would sink in some places and rise in others, would mash sometimes down and water and mud would gush up over them, that when trains had passed the rails would straighten and raise some of the ties two inches from the earth," etc., etc.

Also (*Rec. 223*):

"When the track is properly constructed and reasonably well ballasted, it was impossible for stock when struck to get under the train; the pilot would knock them off."

It thus appears that it was not even contended that the track was improperly constructed *by the Kentucky Company*, nor that it was in a defective condition when leased to the Illinois Central, *nor that the track was ever insufficient for the fast running* of trains, nor that any accident ever occurred through the high speed of trains, but only that the *want of ballast* in the track made it dangerous for collisions with animals, especially when the colliding engines had stub pilots. This far-fetched and preposterous contention serves only to demonstrate how hard driven Sheegog was to invent a pretext for joining

the Kentucky Company to prevent removal. Part of his contention was that the use of a stub pilot, instead of a standard pilot (which was said to stand closer to the rail), was partly blamable for the collision, but the use of the stub pilot would have convicted only the Illinois Central and would not have implicated the Kentucky Company, consequently a complaint of the railroad track, according to the theory advanced, was necessary to implicate the Kentucky Company.

Sheegog's theory is, indeed, so preposterous as to be almost incomprehensible. It is discussed at length in the Illinois Central's petition for a rehearing (*Rec. 207 et seq.*).

It is advanced *in extenso* by Sheegog's witness, Fivecoats (*Rec. 57, 63 and 208*) and the contention, briefly, is that if an engine encountered a mule lying upon a railroad track with its feet extended toward the approaching engine, the mule would be thrown from the track if the track were properly ballasted; but if not so ballasted, the engine would mount the mule and be derailed. The ingenuous explanation of this subtle theory is that if the track were not ballasted, there would be room between the base of the pilot—especially if it were a stub pilot—and the earth to receive the mule's feet; but if the track were properly ballasted, there would not be sufficient room for his feet, and the pilot would—especially if a standard pilot—pass under the mule and throw him from the track; and it is accordingly declared that the failure to ballast the track was the *proximate cause* of the derailment of the engine colliding with the mule. That this contention

is simply a device to implicate the Kentucky Company and thereby prevent the removal of the case to the Federal court seems obvious without argument. The speculation that a mule's legs extended toward an approaching engine would pass over the pilot if the track were ballasted, but under it if not ballasted, is too fanciful for serious consideration; and, indeed, if it were grave, *who could say that this particular mule's feet were actually extended toward the approaching engine, or, indeed, that the mule was lying upon the track at all?* The claim, therefore, that the Kentucky Company is liable for not so constructing a track as to cause the pilot to throw a mule from the track, instead of mounting the mule, is obviously but a fraudulent pretext for implicating the Kentucky Company in order to prevent removal.

The State Court's criticism of our petition for removal (*Rec. 226*) is answered in our petition for a rehearing (*Rec. 206*). *Sec. 119, Ky. Code,* does not govern petitions for removal, and, even if it were otherwise, Sheegog, himself, pleaded *in extenso* the lease from the Kentucky Company to the Illinois Central and the possession and operation by the lessee (*Rec. 2, 206*).

From the foregoing suggestions, obvious upon the record, it appears, *first*, that the State Court was required by the *Act of Congress* to accept the allegations of the petition for removal *as true* without hearing evidence upon an issue as to their truth; *and that this point alone is decisive of our right to a reversal; secondly,* that the evidence from which the State Court made its remarkable deductions as to the proximate cause of the derailment

of the engine was not even introduced upon an issue made upon the petition for removal, but was the evidence heard upon the trial before the jury on the merits; *thirdly*, that Sheegog's theory as to the condition of the track being the proximate cause of the derailment of the engine is so far-fetched and preposterous as to indicate it to be a fraudulent pretext to defeat Federal jurisdiction; *fourthly*, that when an act ascribed to the Kentucky Company asserted to be the proximate cause of the wrong complained of is *set up as an element of jurisdiction*, and as a *criterion* of Federal jurisdiction this court will not permit the State Court to conclude its judgment upon the *effect* of the facts deducible from the evidence, or even accept it as determined by the State Court from the evidence, but will, itself, consider the evidence, or at least consider whether the facts deducible from the evidence, or by the State Court deduced therefrom, are the proximate cause of the wrong complained of. *Were it otherwise the State court could always foreclose the question of Federal jurisdiction where a fraudulent joinder of improper parties were made to defeat Federal jurisdiction. Keith* v. *Clark, 97 U. S. 454; Lou. Gas Co.* v. *Citizens Gas Co., 115 U. S. 683, 697; Terre Haute & I. R. R. Co.* v. *Ind., 194 U. S. 579; Schlemmer* v. *Buffalo, etc., R'y Co., 205 U. S. 1, 11.* Likewise, when a constitutional question consists in a question of fact, or a mixed question of law and fact, such as is involved in the claim of a confiscatory rate, this court will determine for itself the question of fact, *Smith* v. *Ames, 169 U. S. 466; ex parte Young, 209 U. S. 123.* Not only is this court not concluded by the

decision of a State Court on such questions as aforesaid, but even where the State Court has held upon evidence before it that a Federal question is not involved, this court will consider the evidence to determine whether or not such a question is involved if it recognizes that the decision of the State Court has for its *premise* a "*cognizable mistake.*" *Terre Haute & I. R. R. Co.* v. *Ind., supra; Schlemmer* v. *Buffalo, etc., R'y, supra.*

The discussion of this point, however, is supererogatory, because, as above indicated, the State Court had no jurisdiction to consider evidence, much less evidence heard upon the merits of the case, upon the truth of the averments of the petition for removal.

CONCLUSION.

Appreciating that it is highly important that State and Federal jurisdiction should be justly defined, and that attempts to cheat the jurisdiction, either State or Federal, should be emphatically condemned, we have probably extended this brief beyond the necessities of the particular case. A reversal of the judgment of the Kentucky Court of Appeals is respectfully prayed.

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Supreme Court, U. S.
FILED.
DEC 2 1909
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY, OF THE STATE OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

ROBERT W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, DECEASED, DEFENDANT IN ERROR

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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(20,944)

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SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

All the questions which were orally argued are so fully treated in our original brief that we shall confine this supplement to a discussion of a question propounded by one of the justices, namely, if the petition for removal be sufficient.

We submit that it is entirely sufficient.

In our opponent's brief we do not find that the sufficiency of the petition is questioned, except for the reason suggested by the court (*Rec., 226*), that it does not comply with *section 119* of the *Civil Code of Practice* of Kentucky, prescribing how a private act of the Kentucky Legislature shall be pleaded. Nor does the State court deny the sufficiency of the petition for removal, but *e contra* the State court says (Rec., 222):

> "The defendant, Illinois Central Railroad Com-
> "pany, has filed its petition and bond for removal
> "of the case to the Federal court, alleging a separable
> "controversy between it and the appellee determina-
> "ble by them without either of its co-defendants,
> "and alleging joinder of its co-defendants in fraud
> "of Federal jurisdiction. The court refused to trans-
> "fer the case."

It will thus be seen that the State court assumed that the petition for removal sufficiently set up the fraudulent joinder.

We submit that the petition is sufficient. The lessor was not properly joinable, under the State court's decisions (Rec., 229, 230, 231; Opponent's Brief, p. 6), unless the proximate cause of the injury was a defect in the roadbed, for only for such defects was the lessor responsible, and this, although not expressly decided, was announced *obiter* in Swices, Adm'x, *vs.* A. D. & M. Ry., 116 Kentucky, 253, and this was decided before the present action was commenced. This was shown in our opponent's argument. *See his brief, p. 6.*

We submit that the petition for removal is good, and is as good as the petitions upheld in *C. & O. Ry. vs. McCabe, &c.*, 213 *U. S.*, 207, *No.* 89, *October Term* 1908, *pp.* 10 *et seq.*; *Dishon vs. Ry.*, 133 *Fed. R.* (*C. C. A.*), 471; *A. K. & N. Ry. vs. Sou. Ry.*, 153 *Fed. R.* (*C. C. A.*), 123, *Lurton, J.*; *McAlister vs. C. & O. Ry.*, 157 *Fed. R.* 743 (*C. C. A.*), and *Donovan vs. Wells-Fargo, etc.*, 169 *Fed. R.* (*C. C. A.*), 366, 367.

Our petition for removal, as did the petition in the *McCabe case*, and as do the petitions in most of the cases, recites the allegations of the petition of the plaintiff undertaking to connect the improperly joined defendant with the cause of action, and avers that such allegations are not true, that they were known to be untrue, and that they were made solely to connect the improperly joined defendants with the cause of action asserted against the petitioner in order to manifest

upon the plaintiff's pleading a case which could not be removed to the Federal court. Our petition proceeds upon exactly the same basis, namely, of averring that the allegations of plaintiff's petition as to the joint negligence, and the negligence in the maintenance of track, "*altogether*" causing wreck, were falsely and fraudulently made "when the plaintiff well knew that such allegations were untrue and did not expect to establish them," etc., etc., as quoted in our original brief, p. 3.

If, however, the petition for removal failed to make averments in sufficient detail the petition would be amendable. See *Donovan vs. Wells-Fargo*, 169 Fed. R., 366, 367; *Kinney vs. Columbia, &c., Asso.*, 191 U. S., 103.

The circumstance that the petition for removal in *Wecker vs. National, etc., Company*, 204 U. S., 176, 186, was somewhat more in detail does not, of course, prove that our petition is not sufficient. The difference between the petitions is principally in form. The plaintiff in the Wecker case joined the superintendent upon the ground that he had been negligent, and the petitioner, in petition for removal, averred that the superintendent was not charged with superintendence of the plaintiff, or the duty of planning the furnace, or providing a suitable furnace, or instructing the plaintiff as to his duties "*as charged in the complaint*" (p. 180), while our petition avers that the allegations, which are recited at length, connecting the lessor with the accident, were untrue, and known to be untrue, etc., etc. Although, therefore, the Wecker petition may be somewhat more in detail, the substance of the two petitions is the same. To say, affirmatively in form, that certain things are not true "as charged in the complaint" is not different in substance from the allegations in our petition which recite the plaintiff's allegations at length and say that they were untrue, known to be untrue, and made solely to prevent removal.

Wherefore we submit that our petition is sufficient, and that it would not have been made better by a recital of the

evidence upon which we relied to show that the allegations of the plaintiff connecting, or attempting to connect, the lessor with the accident were untrue.

Very respectfully,

EDMUND F. TRABUE,
JOHN C. DOOLAN,
ATTILLA COX, JR.,
Counsel for Plaintiff in Error.

BLEWETT LEE,
H. D. ALLEN,
Of Counsel.

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Office Supreme Court, U. S.
FILED.
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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 41.

ILLINOIS CENTRAL RAILROAD COMPANY, OF THE STATE OF ILLINOIS, PLAINTIFF IN ERROR,

vs.

ROBERT W. SHEEGOG, ADMINISTRATOR OF JOHN E. SHEEGOG, DECEASED, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

JOHN G. MILLER,
Counsel for Defendant in Error.

JOHN K. HENDRICK,
P. B. MILLER,
Of Counsel.

(20,944)

SUPREME COURT OF THE UNITED STATES.

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No. 41.

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vs.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The original brief of plaintiff in error was not filed and copy furnished to us in time for us to have it before us in the preparation of our brief, as we had to be ready for the date upon which we first expected this case to be called. We anticipated as best we could what it would be.

It may be that because of our failure to answer categorically the arguments of opposing counsel in his brief, he was thus led to make the stupendous and astounding error contained in his statement, made for the first time in his closing argument, and repeated in his supplementary brief filed since argument.

He says: "The sufficiency of the petition (for removal) is not questioned except for the reason suggested by the

court (Court of Appeals) that it does not comply with section 119, Civil Code of Practice of Kentucky."

We did incidentally note this point, because the court's position in his respect was challenged in the assignment of errors, and because we anticipated that counsel for defendant in error would attack same as was done on page 47 of the brief, and because we believed that the Court of Appeals was correct in this position.

This court has repeatedly held that the laws of the State must be complied with in pleadings and in practice, and the question made here must be submitted to the court of last resort in the State according to the laws of the State, or this court will not entertain the question upon appeal for writ of error.

C. & O. Ry. *vs.* McDonald, decided April 19, 1909.

The petition for removal set forth as its *only fact* to show that the lessor company was improperly joined the lease which it claimed to have been authorized by some act of the legislature, yet did not *name the act*, as required by the Code, nor *set forth the terms of the lease, nor file same or a copy thereof*. The Kentucky court very properly held that this was insufficient, but we did not rely upon this alone, as we shall soon show.

The supplemental brief makes the still more astounding statement that the State court "did not deny the sufficiency of the petition for removal," when in truth and in fact that court wrote page after page showing why it thought the said petition insufficient. (See page 224 of Record, where the court began the discussion of this point, note its discussion, and then that it says at the bottom of page 225:)

> "As the petition for removal and the record in this case did not in *our opinion state facts sufficient to confer jurisdiction* upon the United States Circuit Court, that tribunal had not the right to inquire into their truthfulness nor to hear evidence as to other

> facts not alleged in the record or the petition for removal, and by adding such evidence to the insufficient allegations, find the needed jurisdictional facts."

Then, after further argument, the opinion on page 226 says:

> "The petition for removal denies the negligence charged in the petition. This is not a jurisdictional fact under all the authorities."

Then, speaking of the fact that the petition for removal relied upon a lease to show the improper joinder, the opinion said:

> "Even if this plea could be made available," etc.,

and set forth the requirements of section 119, Civil Code.

After all that the court, for the sake of argument, assumed that a valid lease had been made, and said:

> "Even if the act and the lease had not been defectively pleaded, the result would be the same."

It then goes into an absolutely unanswerable argument to show that even if the lease had been fully set forth it could not have divested, or relieved, the lessor of the duties owed by it to the public as to maintenance of track, way, lands, depots, cattle guards, etc., and to show that it therefore remained jointly bound with the lessee, and that it could not be a fraud to charge it and the lessee jointly with negligence in these respects.

We have thus, *in justice to the Court of Appeals of Kentucky*, called attention to its real position in this case, and in doing so have shown our own position and the basis upon which our brief and oral argument rested.

From the very beginning of our brief, almost the first words under the caption, we were claiming that the petition for removal was insufficient, and on page 20 we say:

> "That petition is insufficient, because taken with the record it fails to show the controversy is wholly between citizens of different States."

Our whole argument is based upon this idea, and the opinion written by Judge Shiras in Person *vs.* Illinois Central R. R. Co., 118 Fed., 342, expressed so well our views in the matter and was so clear and unanswerable that we quoted pages of it in our brief to show that the petition for rehearing was insufficient, and that there the court holds that the question of a fraudulent joinder of the lessor company cannot arise or be considered in such a petition in a case of this kind, unless "it is the settled law of the State * * * that a lessor of a railway line within the State is not liable for the negligence of its lessee in the operation of its leased line."

If, under the law of the State, the lessor was liable with the lessee, or if the question is undecided in that State, Judge Shiras holds that it is impossible to decide that the joinder of the lessor was a sham or fraud, because the plaintiff had a right to ask the court of his State to decide that question in his favor.

We contended in our brief, in our oral argument, and we contend now that if the lessor was, to use an expression of opposing counsel, "properly joinable," then the allegation that plaintiff was guilty of fraud in charging the lessor and the lessee with the same negligence as to maintaining its road goes for nothing.

If the lessee is liable because of a rotten track the lessor is also liable. It is impossible for him to escape. The very fact that makes the lessee liable makes the lessor also liable. Then to say that it is improper or fraudulent to join them is scarcely less than absurd.

Opposing counsel seems to have discovered that it is not fraudulent to join as defendants two parties whom the law holds to be jointly liable, and his supplemental brief seems directed to the effort to show that the "lessor was not prop-

erly joinable," and that the two defendants were "improperly joined."

If the law of Kentucky makes the lessor and lessee jointly liable for this defective track, we submit that it cannot be a fraud to sue them jointly.

If they are equally liable, the lessor could just as consistently say we made him a defendant fraudulently in order to give the Federal court jurisdiction, and under the unrepealed portion of the Removal Act of 1875 could require the case to be moved to the State court, if it had been brought in the Federal court, for the same reason that the codefendant could have it go from the State to the Federal court. This is an absurdity.

We call attention to this further fact, there is *not a decision of this court on record holding a case removable for a fraudulent joinder where the court also held that there was no legal misjoinder.*

The Wecker case comes nearer to this than any other, but does not so decide.

If this court shall hold this case to be removable, it must do so while holding at the same time that the law of Kentucky makes the defendants, the lessor and lessee, jointly liable, and that there was no legal misjoinder, and that although the identical facts were charged against both, and submitted to a jury, and the jury found those facts to exist as charged, and that the highest court of Kentucky held that the joinder was proper under the laws of that State, and that the jury's verdict was not only supported by the evidence, but overwhelmingly so, and must send this case back through the State courts to be remanded or removed to the Federal court, because *one of the defendants* said that the plaintiff was *not honest* in charging him with negligence.

Counsel for defendant in error, in his great effort to show fraud, says:

> "The lessor was not properly joinable under the State court's decision, unless the proximate cause of

the injury was a defect in the road bed, for only such defects was the lessor responsible, and this, although not expressly decided, was announced obiter in Swices, Adm'r'x, *vs.* A. D. & M. Ry., 116 Ky., 253, and this was decided before the present action was commenced."

This is a virtual admission that the joinder was proper, and the effort to avoid it by saying, as was said in argument, that the striking of the mule and not the defective track was the proximate cause is an utter failure. Because, first, if the track or defective condition of the track, cattle guard, etc., did not cause the accident, all that was necessary was a denial of that allegation. Second, if this was not sufficient, and it was necessary and proper to plead, as the defendants did, that the mule came upon the track and was struck and caused the wreck, then this would be a plea in avoidance, and a sufficient reply to it was that made by plaintiff, to wit, that the negligence of the lessor and the lessee to keep their cattle guard in order at the public crossing described in the pleadings, as required by section 1793, Kentucky Stats. (Carroll), was the cause of the mule coming upon the track, and that under the authorities cited in our original brief this would of itself make both lessor and lessee liable.

Regarding the case of Donovan *vs.* Wells-Fargo, etc., 169 Fed., 363, so trusted by counsel for the railroad company, we say it is in direct conflict with the Bohon case, 200 U. S., 221, if it is to be held applicable under the Kentucky law. The allegations of fraud in each case are practically the same, yet this court held the petition in the Bohon case insufficient to remove. Again, it is perfectly manifest that the Donovan case was hastily considered, because of a glaring error that is made in the opinion therein in quoting from this court's decision in Kansas City Suburban Belt Ry. *vs.* Herman, 187 U. S., 63. The opinion in the Donovan case in saying that allegations of fraud must be denied in the Federal court, and that the record must go there for that

purpose, quotes the language of the opinion, written by the Chief Justice, as follows:

> "The averments of fraud were specifically denied," etc.

Now, we respectfully call the court's attention to this fact, that while the Donovan case assumes that this denial was in the Federal court, it was not true. An examination of the Kansas City case will show that that denial of fraud was in the State court, and the State court alone passed on the question of fraud in that case, and this court, while holding that questions of fact—material fact—must be tried in the Federal court, held that as the State court had decided the question correctly, it would be absurd to send it back to the State court, and thence to the Federal Circuit Court, to reach the same conclusion.

Now, in the case under discussion we submit that nothing in this record shows that this case was taken or attempted to be taken to the Federal court until after the jury trial in the State court, which was in March, 1905, about sixteen months after the petition for removal was first filed; that when the State court held in November, 1903, that the case was not removable, the railroad company prayed an appeal to the Court of Appeals of Kentucky, which was granted; that nothing is shown by this record to have been done in the way of filing the record in the Federal court until after April, 1905, when the second petition for removal was filed.

After all, the opinion in the Donovan case does not say the case was removable, but sends the question back to the Circuit Court.

Now, we say that unless a defendant perfects his right to remove—by filing the record for the next term of the Federal court, beginning after 20 days—his right is lost. He may afterward go on by appeal to the State court; then if the State Court of Appeals decides the question of fraudu-

lent joinder correctly, as said in case of K. C. S. B. Ry. *vs.* Herman, *supra*, it would be absurd to reverse the decision and send the case back for the long circuit around to the Federal Circuit Court.

If the railroad company had meant to prosecute its motion to remove after the action of the State court in November, 1903, it certainly would have manifested that purpose by writ of certiorari or injunction.

Federal courts will not take cognizance where "the record does not *affirmatively* show jurisdiction" to be in those courts, and the presumption at every stage of the case is that it is without their jurisdiction, unless the contrary appears from the record.

Bors *vs.* Preston, 111 U. S., 253.

Mansfield, &c., Ry. Co. *vs.* Swan, &c., 111 U. S., 383.

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Attorney for Defendant in Error.

JNO. K. HENDRICK,
P. B. MILLER,
Of Counsel.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* SHEEGOG.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 41. Argued December 12, 1909.—Decided December 20, 1909.

Where the joinder of the resident and the non-resident defendants prevents removal to the Federal court, the fact that on the trial the jury finds against the non-resident defendant only has no bearing on the question of removal if the joinder was not fraudulent.

Allegations of fact, so far as material in a petition to remove, if controverted, must be tried in the Federal court, and therefore must be taken to be true when the state court fails to consider them.

A plaintiff may sue the tort-feasors jointly if he sees fit, regardless of motive, and an allegation that resident and non-resident tort-feasors are sued for the purpose of preventing removal to the Federal court is not a sufficient allegation that the joinder was fraudulent.

A lessor railroad company remains responsible, so far as its duty to the public is concerned, notwithstanding it may lease its road, unless relieved by a statute of the State.

Whether defendants can be sued jointly as tort-feasors is for the state court to decide; and so held that, where the state court decides that a lessor road in that State is responsible for keeping its roadbed in order, the joinder of both lessor and lessee roads in a suit for damages caused by imperfect roadbed and management is not fraudulent and the lessee road, although non-resident, cannot remove if the lessor road is resident.

126 Kentucky, 252, affirmed.

THE facts are stated in the opinion.

Mr. Edmund F. Trabue, with whom *Mr. John C. Doolan*, *Mr. Attilla Cox, Jr.*, and *Mr. Blewett Lee* were on the brief, for plaintiff in error:

The lessor and conductor were joined as petitioner's co-

defendants solely to prevent a removal to the Federal court, and the trial court sustained their motions for peremptory instructions in their favor, and plaintiff below prosecuted no appeal from these judgments, but abandoned his case as to them both.

The allegations of fact in a petition for removal must be accepted by the state court as true, because an issue on such allegations can be tried only in the Federal court. *Railway* v. *Dunn*, 122 U. S. 513, 517; *Plymouth* v. *Amador Co.*, 118 U. S. 264, 270; *Louisville R. R. Co.* v. *Wangelin*, 132 U. S. 599; *Alabama Gt. Southern Ry. Co.* v. *Thompson*, 200 U. S. 218; *Wecker* v. *National Co.*, 204 U. S. 176; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207; *Dow* v. *Bradstreet*, 46 Fed. Rep. 824; *Arrowsmith* v. *Railroad Co.*, 57 Fed. Rep. 165; *Diday* v. *Railway Co.*, 107 Fed. Rep. 565; *Union Co.* v. *C., B. & Q. R. R. Co.*, 119 Fed. Rep. 209; *Kelly* v. *C. & A. R. Co.*, 122 Fed. Rep. 286; *Gustafson* v. *Railway Co.*, 128 Fed. Rep. 85; *Dishon* v. *C., N. O. & T. P. Ry. Co.*, 133 Fed. Rep. 471; *Boatmen's Bank* v. *Fritzlen*, 135 Fed. Rep. 650, 668 (certiorari denied, 198 U. S. 586); *South Dakota Co.* v. *Cin. & St. P. Ry. Co.*, 141 Fed. Rep. 578, 581; *Thomas* v. *Great North. Ry. Co.*, 147 Fed. Rep, 83, 86; *Atlanta, K. & N. Ry. Co.* v. *Sou. Ry. Co.*, 153 Fed. Rep. 122, 126; *M'Guire* v. *Great North. Ry. Co.*, 153 Fed. Rep. 434, 439; *Politz* v. *Wabash Ry. Co.*, 153 Fed. Rep. 941; *M'Alister* v. *Ches. & Ohio Ry. Co.*, 157 Fed. Rep. 740, 743; *Harrington* v. *Gt. Nor. Ry. Co.*, 169 Fed. Rep. 714; *Donovan* v. *Wells, Fargo & Co.*, 169 Fed. Rep. 363.

The state court, therefore, had no jurisdiction to try or determine the question of fact tendered by the petition for removal, much less to try it on evidence heard only on the merits. *Rutherford* v. *I. C. R. R. Co.*, 120 Kentucky, 15; *Coley* v. *I. C. R. R. Co.*, 121 Kentucky, 385; *Dudley* v. *I. C. R. R. Co.*, 127 Kentucky, 221; *Underwood* v. *I. C. R. R. Co.*, 31 Ky. L. R. 595, holding that the state court may try issues of fact upon a petition for removal, is a doctrine unsound in

principle and in conflict with the decisions of this court and all of the other Federal courts.

Where the plaintiff joins as the real defendant's co-defendants persons known to be improper parties and fabricates averments concerning them in order to misstate their connection with the case, a petition for removal in alleging fraud in the joinder of the improper defendants may aver the untruth of the plaintiff's averments, otherwise the right of removal to the Federal court might always be frustrated by the plaintiff *ad libitum;* and the courts will be astute to prevent such devices. Miller, J., 4 Dill. 277 (cited in 57 Fed. Rep. 169), and see *Crawford* v. *I. C. Ry. Co.*, 130 Fed. Rep. 395; *C., R. I. & P. Ry. Co.* v. *Stepp*, 151 Fed. Rep. 908, and other cases cited *supra.*

Although the state court was without jurisdiction to try an issue of fact upon the petition for removal and the assumption of the state court to pass upon the truth of the averments of such petition of itself entitles the Illinois Central to a reversal of the judgment now assailed, nevertheless the same result would follow a consideration of the case which the state court assumed to try as arising upon the record, because it is demonstrable from the opinion itself that the state court was not justified in holding that the derailment of the engine was the proximate result of the failure of the lessor to perform its public duty in its failure to construct safe roadbed.

This unwarrantable speculation is too far-fetched to justify the joinder of the Kentucky Company upon the assumption that the supposed condition of its track caused the wreck in any such fantastic way as suggested by the state court. *Neeling* v. *C., St. P. & K. R. R. Co.*, 98 Iowa, 554; *Cox* v. *C. & N. W. Ry. Co.*, 102 Iowa, 711.

If the state court had had jurisdiction to try the truth of the averments of the petition for removal it must have heard witnesses to that end. Instead of so doing the state court tried the Illinois Central's averments on jurisdiction by evi-

dence upon the merits, and as if it were trying the liability of the Kentucky Company, which had previously been dismissed. Its judgment is, therefore, reversible from any standpoint.

Defendant in error's case against the plaintiff in error is a distinct cause of action on which a separate suit might be brought and complete relief afforded without any other party in court. *Barney* v. *Latham*, 103 U. S. 205.

Permission of state practice to join defendants does not prevent a separable controversy between plaintiff and one of them. *Kelly* v. *Railroad Co.*, 122 Fed. Rep. 286, 291; *Williard* v. *Railroad Co.*, 124 Fed. Rep. 796, 801; *Yates* v. *Railroad Co.*, 137 Fed. Rep. 943; *Iowa Ry. Co.* v. *Bliss*, 144 Fed. Rep. 446; *Manufacturing Co.* v. *Brown*, 148 Fed. Rep. 308; *South Dakota Co.* v. *Railway Co.*, 141 Fed. Rep. 578, 581; *Stockton* v. *Oregon Short Line*, 170 Fed. Rep. 627, 633; *Wallin* v. *Reagan*, 171 Fed. Rep. 758, 763.

State legislation cannot control Federal jurisdiction. *Hyde* v. *Stone*, 20 How. 170, 175; *Smyth* v. *Ames*, 169 U. S. 466; *Brow* v. *Wabash*, 164 U. S. 271.

Mr. John G. Miller, with whom *Mr. P. B. Miller* was on the brief, for defendant in error:

Case is not removable until the record on its face shows facts which give the Federal court jurisdiction. *Ex parte Wisner*, 203 U. S. 449; *Kinney* v. *Columbia Sav. & Loan Asso.*, 191 U. S. 78.

If the case be not removed, the jurisdiction of the state court remains unaffected; and under the act of Congress the jurisdiction of the Federal court could not attach until it becomes the duty of the state court to proceed no further. *Crehore* v. *M. & O. Ry. Co.*, 131 U. S. 240; *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S. 279; *Stevens* v. *Nichols*, 130 U. S. 230; *Phœnix Ins. Co.* v. *Pechner*, 95 U. S. 183; *National Steamship Co.* v. *Tugman*, 106 U. S. 118; *B. & O. R. R. Co.* v. *Koontz*, 104 U. S. 514.

The controversy must be wholly between citizens of different States in order to remove the case, and such is not the case when one or more defendants jointly sued are citizens of the same State with plaintiff. *Core* v. *Vinal*, 117 U. S. 347; *Chesapeake* v. *Ohio R. R. Co.*, 179 U. S. 131; *Powers* v. *C. & O. R. R. Co.*, 169 U. S. 92; *Alabama G. S. R. R. Co.* v. *Thompson*, 200 U. S. 206; *C., N. O. & T. P. R. R. Co.* v. *Bohon*, 200 U. S. 221.

If the act of an individual is within the terms of the law, whatever may be the reasons which govern him, or whatever may be the result, it cannot be impeached. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Prewitt* v. *Mut. Life Ins. Co.*, 115 Kentucky, 26.

Plaintiff's motive in the performance of a lawful act was not open to inquiry. *C. & O. R. R. Co.* v. *Dixon*, 179 U. S. 131.

The construction given to the statute of the State by the highest tribunal of the State is regarded as part of the statute and is binding upon the courts of the United States as a text. *Leffingwell* v. *Warren*, 2 Black, 599; *Com. Bank* v. *Buckingham*, 5 How. 317; *Jackson* v. *Lamphire*, 3 Pet. 280.

When the highest judicial tribunal of a State has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. See 92 Fed. Rep. 124; *Clayborne* v. *Brooks*, 111 U. S. 400; *Detroit* v. *Osborne*, 135 U. S. 499; *Gilman* v. *Sheboygan*, 2 Black, 510; *L. & N. R. R. Co.* v. *Kentucky*, 183 U. S. 508; *Connell* v. *Utica E. R. R. Co.*, 13 Fed. Rep. 241; *C. & O. Ry. Co.* v. *Dixon*, 179 U. S. 131; *Southern Ry. Co.* v. *Carson*, 194 U. S. 136; *Alabama G. S. R. Co.* v. *Thompson*, 200 U. S. 206; *Cin., N. O. & T. P. R. R. Co.* v. *Bohon*, 200 U. S. 221.

In case of a misjoinder, a plaintiff's motive in joining a party as defendant can be questioned only when by legislative act or judicial decision it is the settled law of the State in which

the action is brought that the defendant, alleged to be joined as a sham and a fraud, is not liable; and no such question can arise where the law of the State by judicial decision or legislative act fixes the liability of such defendant. Cases *supra*, and *Person* v. *I. C. R. R. Co.*, 118 Fed. Rep. 342.

The action for death is regulated by the Kentucky constitution and statute. Const. Ky., § 241; Ky. Stat., § 6. And the liability of a railroad corporation that leases its track is regulated by the Kentucky constitution, § 203, which forbids the shifting of that liability from the lessor to the lessee.

Independent of the constitutional provision the corporation owning the road and having received a charter from the State is under certain public duties that even a duly authorized lease will not shift or change, and the owner cannot divest itself of those public duties. *Brooker* v. *M. & B. S. R. R. Co.*, 119 Kentucky, 137; *McCabe* v. *M. & B. S. R. R. Co.*, 112 Kentucky, 861; *Swice* v. *M. & B. S. R. R. Co.*, 116 Kentucky, 253; *Howard* v. *M. & B. S. R. R. Co.*, 70 S. W. Rep. 631; *Davis* v. *C. & O. Ry. Co.*, 75 S. W. Rep. 227; *Clinger* v. *M. & B. S. R. R. Co.*, 109 S. W. Rep. 317.

While the lessor may not be liable to the servant of the lessee for an injury caused by the negligent act or omission of the lessee as to some duty growing out of the mere relationship of master and servant, the lessor is liable for an injury to any member of the public, including the servant of the lessee, who may be injured by a negligent act or omission as to a public duty, such as a failure to keep its roadbed or track, cattle guards, fences, or station houses in a reasonably safe condition. *Swice* v. *M. & B. S. Ry. Co.*, 116 Kentucky, 253; *Nugent* v. *Boston Railroad Co.*, 80 Maine, 62; *Curl* v. *Railroad*, 28 Kansas, 622; *Arrowsmith* v. *Railroad*, 57 Fed. Rep. 165; *Lee* v. *S. P. R. R. Co.*, 116 California, 97.

To sue all three of the defendants for damages resulting from the negligent acts charged in the petition of plaintiff, is allowable under the Kentucky practice, and all were jointly bound or liable. *Pugh* v. *C. & O. Ry. Co.*, 101 Kentucky,

77; *Rutherford* v. *I. C. R. R. Co.*, 27 Ky. L. R. 397; *Jones* v. *I. C. R. R. Co.*, 26 Ky. L. R. 31; *I. C. R. R. Co.* v. *Coley*, 28 Ky. L. R. 336; *Cent. Pass. Ry. Co.* v. *Kuhn*, 86 Kentucky, 578; *Hawkins* v. *Riley*, 17 B. Mon. 101; *C. & O. R. R. Co.* v. *Dixon*, 179 U. S. 131.

Under the authorities *supra*, the construction given by the Court of Appeals of Kentucky to § 119 of the Kentucky Civil Code is conclusive; and no act of the legislature or authority for the lease is set forth in the petition for removal; and that being true, the lease, if such existed, is not shown by any allegation to have been authorized by law and should, therefore, be treated as void. *Thomas* v. *West Jersey R. R. Co.*, 101 U. S. 71; *Railroad* v. *Winans*, 17 How. 30.

Petition to remove after a trial on the merits comes too late. A peremptory instruction to find for any of the defendants was "ruling on the merits and not a ruling on the question of jurisdiction." "The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." *Whitcomb* v. *Smithson*, 175 U. S. 635; *Kansas City Suburban Belt Ry.* v. *Herman*, 187 U. S. 63.

Therefore, not only does the petition of the plaintiff allege facts that would constitute a joint cause of action against all of the defendants, as held by the Court of Appeals of Kentucky, but as stated by the opinion of that court in this case, "the testimony showed without much contradiction" the truth of plaintiff's allegations as to the miserably defective and dangerous condition of this track and thus absolutely fixed the liability of both the lessee and the lessor for the death of the plaintiff's intestate which was caused thereby,—and the effort to avoid this conclusion by claiming the striking of the stray mule by the engine was the proximate cause, only makes matters worse for the corporations, because their actionable negligence in violating § 1793, Kentucky statute, as to a cattle guard at that place, caused the collision with the mule.

MR. JUSTICE HOLMES delivered the opinion of the court.

THIS is a writ of error to reverse a judgment rendered by the Court of Appeals of Kentucky in favor of the defendant in error, notwithstanding a petition and bond for removal to the Circuit Court of the United States. *I. C. Ry. Co.* v. *Sheegog's Admr.*, 126 Kentucky, 252.

The defendant in error brought this action for causing the death of his intestate, John E. Sheegog, by the throwing off the track of a railroad train upon which the deceased was employed as an engineer. The defendants were the conductor of the train, the Illinois Central Railroad Company, which was operating the railroad and owned the train, and the Chicago, St. Louis and New Orleans Railroad Company, which owned the road and tracks where the accident happened, but which had let the same to the first-mentioned road. It was alleged that through the negligence of both companies the roadbed, track, etc., were in an improper condition; that through the negligence of the Illinois Central the engine and cars were in an improper condition; and that the death was due to these causes acting jointly, the negligence of the Illinois Central in permitting its engine, cars and road to be operated while in such condition, and the negligence of the conductor in ordering and directing the management of the train.

In due season the Illinois Central Railroad Company, being an Illinois corporation, filed its petition to remove. The difficulty in its way was that the other two defendants were citizens and residents of Kentucky, to which State the plaintiff also belonged. To meet this the petition alleged that the plaintiff had joined these parties as defendants solely for the purpose of preventing the removal. It admitted the lease and averred that the Illinois Central Company operated the road exclusively and alone employed the deceased. It went on to allege that the charge of joint negligence against the lessor and lessee in causing the wreck as stated was made only for the above purpose and was fraudulent and knowingly false.

The question is whether these allegations were sufficient to entitle the petitioner to have its suit tried in the Federal court. It may be mentioned here that the jury found for the other two defendants and against the Illinois Central Railroad Company, but that fact has no bearing upon the case. *Whitcomb* v. *Smithson*, 175 U. S. 635, 637.

Of course, if it appears that the joinder was fraudulent as alleged, it will not be allowed to prevent the removal. *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176. And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fall to be considered in the state courts. *Crehore* v. *Ohio & Mississippi Ry. Co.*, 131 U. S. 240, 244. *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207. On the other hand, the mere epithet fraudulent in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Bohon*, 200 U. S. 221. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false.

We assume, for the purposes of what we have to say, that the allegations concerning the lessor state merely a conclusion of law from the acts and omissions charged against its lessee. Or, if they be taken to be allegations of fact, we as-

sume, again merely for the purposes of decision, that they are effectively traversed by the petition to remove. The Kentucky Court of Appeals appears to us to have discussed the case on this footing. Whether it did or not, the question whether a joint liability of lessor and lessee would arise from the acts and omissions of the Illinois Central Railroad Company alone was a question of Kentucky law for it to decide, and it appears to us to have decided it.

We should observe in the first place that the cause of action alleged is not helped but rather hindered by the allegation that the deceased was an employé of the Illinois Central Road. The case did not stand on the breach of any duty owed peculiarly to employés, and on the other hand was encumbered with the fact that a part of the negligence charged was that of a fellow-servant. The plaintiff recovered for a breach of a duty to the public which at best was not released or limited by his intestate's having been in the company's service. Now whether we agree with it or not the doctrine is familiar that in the absence of statute a railroad company cannot get rid of the liabilities attached to the exercise of its franchise, by making a lease. Whatever may be the law as to purely contract relations, to some extent at least the duties of the lessor to the public, including that part of the public that travels on the railroad, are held to remain unchanged. In this case the Court of Appeals, after noting that it does not appear that the lessor was relieved by statute, quotes an earlier Kentucky decision which seemingly adopted the following language of a commentator: "If it be true, as the decisions with substantial unanimity admit, that a lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except perhaps when the plaintiff is suing upon an express contract made with him by the lessee corporation." *McCabe* v. *Maysville & Big Sandy R. R. Co.*, 112 Kentucky, 861, 875.

The court, however, then goes on to refer to a distinction

taken in a later Kentucky case between torts arising from negligent operation and those resulting from the omission of such duties as the proper construction and maintenance of the road, *Swice* v. *Maysville & Big Sandy Ry. Co.*, 116 Kentucky, 253, and quotes, with seeming approval, decisions in other States limiting the liability of the lessor to the latter class. But it then proceeds to show that the recovery in this case is upon a breach of a duty to the public, and that according to the declaration and the verdict the injury was due, in part, at least, to the defective condition of the road. It ends by saying (p. 278): "The appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it." We understand the words 'actual grounds' to mean that the belief was correct on the allegations and findings according to Kentucky law. So that, whatever may be the precise line drawn by that court hereafter, it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect.

It follows, if our interpretation of the decision is correct, that no allegations were necessary concerning the Chicago, St. Louis and New Orleans Railroad Company, except that it owned and had let the road to its co-defendant. The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud. The only way in which fraud could be made out would be by establishing that the allegation of a cause of action against the Illinois Central Railroad was fraudulent, or at least any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of Federal jurisdiction. We have assumed, for purposes of decision, that the railroad held on what may be called a secondary ground is to be charged, if at all, only as

a consequence of the liability of its lessee. But when we come to the principal and necessary defendant, a man is not to be prevented from trying his case before that tribunal that has sole jurisdiction if his declaration is true by a mere allegation that it is fraudulent and false. The jury alone can determine that issue unless something more appears than a naked denial. *Louisville & Nashville R. R. Co.* v. *Wangelin*, 132 U. S. 599, 603. *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131, 138. However, the petition for removal hardly raises this point. For it directs itself wholly against the allegations of joint negligence, and does not attempt to anticipate the trial on the merits so far as the conduct of the Illinois Central is concerned.

Judgment affirmed.

MR. JUSTICE DAY, with whom concurred MR. JUSTICE HARLAN, dissenting.

In my view this decision departs from rulings recently made, and tends to disturb settled principles essential to the maintenance of jurisdiction in the Federal courts. In order to apply my views I will briefly restate the facts of the case.

Sheegog's administrator brought an action in the state court of Kentucky against the Illinois Central Railroad Company, a corporation of the State of Illinois, the Chicago, St. Louis and New Orleans Railroad Company, a corporation of the State of Kentucky, and F. J. Durbin, a citizen of Kentucky. The Illinois Central Railroad Company was the lessee of the Chicago, St. Louis and New Orleans Railroad Company, and F. J. Durbin was alleged to be a conductor in the employ of the lessee road and in charge of the train, in the operation of which, as engineer, plaintiff's intestate was killed. The charge of the complaint was that at the time of injury the defendant, the Chicago, St. Louis and New Orleans Railroad Company, was the owner of the roadbed, right of way, etc., and the Illinois Central Railroad Company was the lessee of

the railroad property, and the owners of the cars, engines, trains and appliances, in the operation of which the intestate was killed; that the defendant Durbin was the conductor in the employ of the Illinois Central Railroad Company, operating the train at the time of the injury. The negligence charged against the defendant railroad companies was that the roadbed, rails, track, cattle guards, ties, fences and right of way of the railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous and defective condition; and, in addition thereto, as to the Illinois Central Railroad Company, its cars and engines were knowingly allowed to be and remain in an improper, defective and dangerous condition, and were improperly constructed, whereby the injury was caused, and that the defendant Durbin was guilty of negligence in running, ordering and directing the train, and contributed to the injury thereby. And as a conclusion the plaintiff charged the negligence of the railroad companies, as above described, in the maintenance of the track, roadbed, cattle guards, etc., together with the negligence of the Illinois Central Railroad Company in directing and permitting its cars, engines and road to be operated while in a dangerous and defective condition, and the negligence of the conductor in directing the running and management of the train, "all together jointly caused said wreck, and killed the plaintiff's intestate."

Within the time allowed by law the Illinois Central Railroad Company, the present plaintiff in error, appeared and filed its petition for removal to the Federal court. As the sufficiency of this petition to make a cause for removal is the ultimate question in the case it is necessary to set out its allegations somewhat in detail:

"Your petitioner says that plaintiff's decedent at the time he received the fatal injury complained of was an employé of your petitioner, and not an employé of either of your petitioner's co-defendants, and was not and never had been an employé or in the employ of said lessor, or said F. J. Durbin,

and that all the said facts were well known to plaintiff when this action was brought. Your petitioner says that to avoid such removal to the Federal court of this action plaintiff joined your petitioner's co-defendants, one a Kentucky corporation and the other a citizen of Kentucky, and falsely and fraudulently alleged in its petition that the train on which decedent was engaged was, through joint and gross negligence and carelessness of all the defendants, derailed, and said decedent instantly killed, and falsely and fraudulently alleged that by the negligence of both defendants' roadbed, rails, track, cattle guards, fences and right-of-way of the said railroad was allowed to be, and for a long time had been, in a weak, rotten, ruinous, defective and improper condition, and by the negligence of your petitioner its engine and cars were knowingly allowed to remain in an improper and defective and dangerous condition, and said engine and cars to be so constructed as to be in a dangerous condition, and that this improper and dangerous condition of the road premises and cars of the defendants was known to the defendants, and that at the time of the wreck and accident the same were being operated in a careless manner by all the defendants, and the defendant Durbin, by his negligence in running, ordering and directing said train contributed to cause said accident, and that the negligence of the defendant in its maintenance of its track, roadbed, engine, cattle guards, rails, ties, fences, etc., as set out above, together with the negligence of your petitioner in directing and permitting its engine cars and roadbed to be operated while in a defective and dangerous condition, and the negligence of said Durbin in ordering and directing the running and management of said train, and in failing to give proper directions, altogether caused said wreck, and killed said decedent, when the plaintiff well knew that such allegations were untrue, and plaintiff did not expect to establish said allegations, and did not make them for the purpose of proving them at the trial, or of substantiating his cause of action therewith, but made them solely for the pur-

pose of attempting to set up a joint cause of action against the three defendants in order to make a case which would not be removable to the Federal court."

The state court overruled this motion to remove, and its action was affirmed by the Court of Appeals of Kentucky. *I. C. Ry. Co.* v. *Sheegog's Admr.*, 126 Kentucky, 252.

In the court below a peremptory instruction was given the jury to find in favor of the Kentucky corporation and the individual defendant. Notwithstanding this fact the Court of Appeals of Kentucky applied a rule which it had laid down in former decisions, and held that the facts developed on the trial had shown that the administrator had reasonable grounds to join the local defendants, and was therefore justified in overruling the motion to remove. In other words, while the opinion seems to recognize that if the allegations of the petition for removal were true a fraudulent joinder was shown, nevertheless the proof upon the merits showed that the joinder was proper.

The ground upon which the Kentucky Court of Appeals held the Kentucky railroad jointly liable with the Illinois Central for the injuries sustained is not very clear, in view of the fact that the opinion in some parts of it seems to make the liability depend upon the failure to construct a proper road and in other parts seems to rest the responsibility upon the continuing duty of the lessor railroad company to furnish and maintain a safe roadbed in order to discharge the duties which it had undertaken by accepting the franchise which the State had conferred upon it. In the case to which the court makes reference, *Nugent* v. *Boston, C. & M. R. Co.*, 80 Maine, 62, where a brakeman was injured by reason of the negligent construction of an awning of a station house of the defendant company, near the track, the liability of the lessor company was rested both upon the ground of the continuing duty to the public and because of the application of the principle which makes a lessor liable for a defective construction of the subject-matter of the lease. In either view it is perfectly

apparent that the liability of the Illinois Central to its employés, and that of the lessor company to the public, rests upon entirely different principles. In the case of the latter the liability is because of the duty which, it is held, the lessor owes to the public; and in the former, because of the obligations of the employer to his employé arising from the relation of master and servant. In this connection the Court of Appeals of Kentucky, 126 Kentucky, in the opinion in this case, said (p. 275):

"In all cases where a valid lease is found (or, as in this discussion where it is assumed), the lessor company owes no duty whatsoever as an employer to the operatives of the lessee company. The claim of relationship of employer and employé under such circumstances is a false claim and quantity. It does not exist. The responsibility of the lessor company, when it attaches, does not spring from this relationship, but arises from a failure of the lessor company to perform its duty to the public, of which public the employé of the operating company may be regarded as one. Thus, in those cases where the injury has resulted to an employé of the operating company by reason of the negligence of a fellow servant, or of want of care of the lessee company in managing the road, or in negligence in furnishing suitable appliances, these and kindred matters being entirely and exclusively within the control of the lessee company for injury which may result, the lessor is in no way responsible. But where injury has resulted to an employé of the operating company by reason of a failure of the lessor to perform its public duty, as in the failure to construct a safe road, as is here charged, the injured employé may sue the lessor company, as one of the public, for its failure to perform that duty, and not because, between himself and the lessor company, the relation of employé and employer, or any relation of contractual privity, exists."

After citing the case from 80 Maine, *supra*, the court adds (p. 277):

"This case is very similar to the one at bar, in which it was

alleged and proved that the intestate's death was the proximate result of the failure of the lessor to perform its public duty in its failure to construct a safe roadbed."

It is apparent that the liability of the two railroad companies, although both might be liable for a defective roadbed, track, etc., sprang from a different relation, and was controlled by different principles. The liability to the plaintiff's intestate, of the Kentucky corporation, was to him as one of the public, that of the Illinois corporation arose from the relation of master and servant, and the duties thereby imposed upon the employer.

But let it be conceded that a proper construction of the opinion of the Kentucky Court of Appeals holds both the railroad companies, although upon different relations to the plaintiff's intestate, liable for a defective roadbed, it is none the less true that the Illinois Central Railroad Company had a right of removal to the Federal jurisdiction, in which to test its liability, unless it was properly joined with the other defendants in an action brought in good faith in the state court.

It is the result of the decisions of this court, as I understand them, that if the facts which asserted a joint liability with the local defendant are shown by proper petition for removal, and proof if necessary, to have been made for the purpose of defeating the jurisdiction of the Federal court, the right of removal still exists in favor of the non-resident company. This court has had occasion to consider this subject in a number of recent cases. Before taking them up we may state certain principles applicable to the law of removals under the removal act which are so well settled as scarcely to need the citation of authorities.

When the petition for removal is filed in the state court, accompanied by the proper bond, a question of law as to the sufficiency of the petition for removal only is presented to that court. *Steamship Co.* v. *Tugman*, 106 U. S. 118; *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S.

279; *Burlington, Cedar Rapids & Northern R. R. Co.* v. *Dunn*, 122 U. S. 513; *Crehore* v. *Ohio & Mississippi Ry. Co.*, 131 U. S. 240; *Traction Company* v. *Mining Co.*, 196 U. S. 239.

It is equally well settled, and is a result of the principle just stated, that where the right of removal arises because of certain facts averred in the petition, that issue cannot be tried in the state court, but must be heard in the Federal court, which alone has jurisdiction to determine such issues of fact. *Carson* v. *Dunham*, 121 U. S. 421; *Burlington, Cedar Rapids & Northern R. R. Co.* v. *Dunn*, 122 U. S. 513; *Crehore* v. *Ohio & Miss. Ry. Co.*, 131 U. S. 240; *Kansas City Railroad* v. *Daughtry*, 138 U. S. 298; *Traction Company* v. *Mining Co.*, 196 U. S. 239.

In recent cases in this court the former adjudications have been reviewed and followed, and it has been held that for the purposes of removal the cause of action must be regarded as joint or several, accordingly as the plaintiff has averred the same to be in his complaint, in the absence of inferences arising from the pleading or shown extrinsically upon a petition for removal, which warrant the conclusion that a fraudulent joinder has been made for the purpose of avoiding the jurisdiction of the Federal court. *Chesapeake & Ohio Ry. Co.* v. *Dixon*, 179 U. S. 131; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Bohon*, 200 U. S. 221. In the *Alabama Great Southern Ry. Case*, 200 U. S. 206, certain employés, citizens of Tennessee, had been joined with the Alabama and Great Southern Railroad Company in an action for negligence, and the question of the right to join them was certified to this court, and it was held, after reviewing the former cases, that, in the absence of fraudulent joinder, the cause of action might be regarded for the purposes of removal to be that which the plaintiff had averred it to be.

In the *Bohon Case*, 200 U. S. 221, considered with the *Alabama Great Southern case, supra*, the action was brought against the railroad company and one Milligan, an engineer

in charge of an engine, the negligent operation of which, it was alleged, resulted in the death of the plaintiff's intestate. It appeared that the joinder was permitted by the laws of Kentucky, and it was held in this court that, in the absence of a showing of fraudulent joinder, the case was not a removable one. An examination of the petition for removal in that case shows that while there were allegations that the joinder was fraudulent, that conclusion was averred to arise because there was no joint liability of the railroad company and the employé; that he was joined because he was a resident of Kentucky for the purpose of preventing removal. But there is no averment in the petition for removal in the *Bohon case* as there is in this case—that the allegations of fact upon which the complaint was based were untrue, made without any expectation of proving them, and for the purpose of defeating a removal to the Federal court. In concluding the discussion in the opinion in the *Bohon case* it was said (p. 226):

"A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly and severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

In *Wecker* v. *Enameling & Stamping Company*, 204 U. S. 176, suit was brought in the state court in Missouri by Wecker against the Enameling and Stamping Company, Harry Schenck and George Wettengel. Wettengel was a citizen of the State of Missouri, the enameling company was a foreign corporation. The complainant charged that the plaintiff was employed by the company in working about certain pots

used in the melting of grease and lubricant matter, which matter was delivered to the plaintiff in barrels of great weight, and which it was the plaintiff's duty to hoist to the top of the furnace and into the pots for melting. The negligence charged against the corporation consisted in allowing the pots to remain open and exposed while filled with hot and boiling lubricants, without covering, railing or device or means of any character to protect the plaintiff from slipping or falling therein, and negligently failing to provide safe and sufficient hoisting apparatus for the use of the plaintiff in his employment, and failing to instruct him in his duties, whereby and because of the negligence charged the plaintiff lost his balance and fell into one of the unguarded and open pots, receiving thereby great and painful injuries. Wettengel, it was charged, was employed by the corporation, and charged with the superintendence and oversight of the plaintiff in the performance of his duties, and with the duty of superintending and planning the construction of the furnace, and providing for the pots a reasonably safe and suitable covering, and sufficiently safe hoisting apparatus, and with the duty of instructing the plaintiff as to the manner of performing his duties. The complaint charges the negligence of Wettengel in planning and directing the construction of the furnace structure and in providing suitable coverings and railings, and in providing and placing reasonably safe and sufficient hoisting apparatus, and in giving instructions as to the manner of performing the plaintiff's duties, and therefore charges that the negligence of the corporation and Wettengel, jointly, caused the injury, and prayed for a joint judgment against them.

In its petition for removal the non-resident corporation charged that Wettengel was not, at the time of the accident and prior thereto, charged with the superintendence and oversight of the plaintiff, or with the duties of planning or directing the construction of the furnace, or providing a reasonably safe and suitable furnace and pots and railings or other device to protect the plaintiff, and was not charged

with the duty of placing reasonably safe and sufficient hoisting apparatus, nor with the duty of instructing the plaintiff in respect to his duties; that Schenck was a non-resident of Missouri, and that Wettengel had been improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States Circuit Court, and that plaintiff well knew at the beginning of the suit that Wettengel was not charged with the duties aforesaid, and joined him as a defendant to prevent the removal of the case, and not in good faith. Defendant offered affidavits tending to show that Wettengel was employed in the office as a draftsman; that he had nothing to do with the selecting of plans or approving the same; that he had no authority to superintend the work or to give instructions to any of the men as to the manner in which they should perform the work; that he was merely a subordinate in the employ of the company, whose sole duties were to attend to the mechanical work of drafting, to make the necessary drawings for the use of the mechanics, and he had nothing to do with the providing of the pots, railings, etc., or the hoisting apparatus; that his position was merely clerical, and confined to the making of drawings to enable mechanics to construct work from plans furnished by others in the employ of the defendant. Upon these affidavits the Circuit Court reached the conclusion that the attempt to join Wettengel was not made in good faith; that the allegations as to him were fraudulent and fictitious, for the purpose of preventing a removal to the Federal court.

This court declined to consider the question as to whether, as a matter of law, the cause of action was joint or several, or whether, upon the allegations of the complaint, Wettengel could be held jointly with the corporation, (204 U. S. 183), and affirmed the judgment of the court below upon its findings of fact upon the issue of fraudulent joinder.

This case, therefore, held the doctrine of this court to be

that the Circuit Court of the United States upon a proper petition for removal may examine into the merits sufficiently to determine whether the allegations, by reason of which a non-resident defendant may be sued in a state court, are fraudulently and fictitiously made for the purpose of preventing removal. It is true that where one has a cause of action of which both state and Federal courts have jurisdiction his motive in bringing the action in the one jurisdiction or the other is immaterial, and he may sue in the state court because he preferred that jurisdiction to a Federal court to which he had an equal right to go.

But this case presents a very different question. The inquiry here is not whether a cause of action exists which may be prosecuted in either court, but whether the allegations of the complaint, which give the right to a joint action in the state court, are falsely and fictitiously made without the intention of proving them, and with the sole purpose of avoiding Federal jurisdiction. Since its decision the case of *Wecker* v. *The Enameling & Stamping Company* has been frequently cited and followed in the Federal courts. *McGuire* v. *Great Northern Ry. Co.*, 153 Fed. Rep. 434; *Donovan* v. *Wells, Fargo & Co.*, 169 Fed. Rep. 363; *Lockard* v. *St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675; *People's U. S. Bank* v. *Goodwin*, 160 Fed. Rep. 727; *McAlister* v. *Chesapeake & Ohio Ry. Co.*, 157 Fed. Rep. 740.

Applying these principles to the case at bar, the allegations of the complaint filed in the state court undertook to make a cause of action against the Illinois Central Company, the non-resident corporation, upon three grounds: First, because it was jointly liable with the Chicago, St. Louis and New Orleans Railroad Company, the local corporation, for a defective roadbed; second, because it was liable for the negligent conduct of the conductor, Durbin, in running its trains; third, because it was liable for the negligent and improper construction of its locomotive and cars. As to the third ground of the complaint, the defective locomotive and

cars, the authorities agree that there is no responsibility upon the part of the lessor company. The policy of the law as ruled by the Kentucky Court of Appeals made the lessor corporation responsible for a defective roadbed, it was not responsible for defective appliances supplied by the lessee company or for negligence in the running and management of the road. This was expressly held by the Kentucky Court of Appeals in *Swice's Administratrix* v. *Maysville & Big Sandy Ry. Co.*, 116 Kentucky, 253, prior to its decision in the case at bar. Therefore, as to this ground of complaint there was no contributing neglect of the local company or the conductor, Durbin.

If the allegations which gave a right to join these defendants were false and fictitious, such joinder should not be allowed to defeat the right of the foreign corporation to avail itself of the Federal jurisdiction. As we had occasion to say in the *Wecker case*, the courts of the United States should not interfere with the jurisdiction of the state courts in cases properly within the same, and the Federal courts should be equally vigilant to defeat all fraudulent devices or attempts to avoid the jurisdiction of the Federal courts. If the allegations of the petition for removal were true the statements of the complaint as to the negligence of Durbin and the local corporation were false and fraudulent, and made without the intention of proving the same, and for the purpose of preventing removal.

The sole jurisdiction to inquire into the truth of these allegations was in the Federal court, and while it would require a clear and strong case to make out such allegations of fraudulent joinder, jurisdiction to make just such an inquiry is vested by law, under the removal act, in the Federal courts. It may be that the allegations for removal might have been more specific, but they were sufficient to enable the Federal court to enter into an inquiry as to the fraudulent character of the joinder of the resident defendants. It might find, upon investigation, that the allegations as to the condition

of the roadbed and the negligence of the conductor were so entirely without foundation as to warrant the conclusion that the local corporation and the conductor were fraudulently joined to avoid the Federal jurisdiction. Indeed, it is to be noted in this connection that at the close of the evidence the trial court directed a verdict in favor of the local corporation and the conductor. It is true that the right to remove depends upon the allegations of the petition, but the course of the case in the state court is an illustration of the possible result of an investigation of the truth of the allegations of the petition for removal.

I therefore reach the conclusion that, upon the face of the petition for removal, there were allegations which ended the jurisdiction of the state court, and a sufficient statement of facts to enable the Federal court to investigate the truthfulness thereof with a view to determine whether they were so false and fictitious as to show that they were made with a view to prevent the removal to the United States court.

In my opinion the judgment of the Court of Appeals of Kentucky should be reversed.

MR. JUSTICE HARLAN concurs in this dissent.